

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

FOR MR. CHIEF JUSTICE MARTIN

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TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

OCTOBER TERM, 1932

No. 5833 **295**

MAUDE S. McLEMORE, APPELLANT,

vs.

JOHN F. MAURY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED OCTOBER 31, 1932.

PRINTED DECEMBER 20, 1932.

Court of Appeals of the District of Columbia

OCTOBER TERM, 1932

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
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Court of Appeals of the District of Columbia

No. 5833.

MAUDE S. McLEMORE, Appellant,

vs.

JOHN F. MAURY.

a Supreme Court of the District of Columbia.

In Equity.

No. 51219.

MAUDE S. McLEMORE, Plaintiff,

vs.

JOHN F. MAURY and OTTO B. McLEAN, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Second Amended Bill.*

Filed December 2, 1930.

In the Supreme Court of the District of Columbia.

Equity. No. 51219.

MAUDE S. McLEMORE, Plaintiff,

vs.

JOHN F. MAURY, OTTO B. McLEAN, Defendants.

Permission having first been secured to file and serve this amended bill of complaint, the above named plaintiff alleges as follows:

1. That at all times hereinafter mentioned she was and now is a resident in the District of Columbia and is a citizen

of the United States and brings this suit in her own right against the above named defendants jointly and severally as copartners and co-adventurers in their respective rights.

2. That the above named defendant Otto B. McLean is a citizen of the United States and at the time of the matters hereinafter detailed was a resident in the District of Columbia but is now temporarily residing in the town of Great Neck, Long Island, New York and is sued herein in his own right and as copartner with the defendant, the above named John F. Maury.

3. That the above named defendant, John F. Maury is a citizen of the United States and a resident of the District of Columbia and is sued herein in his own right and as a copartner with said defendant, the above named Otto B. McLean.

4. That at the times hereinafter mentioned the defendants were and for several years prior thereto had been copartners engaged in the real estate business in the District of Columbia, which business among other activities included the buying of real estate properties on their own behalf and selling the same for profit and gain.

5. That on or about the First day of February, 1927, the defendants as co-partners as aforesaid and pursuant to an express agreement between themselves entered into negotiations for the purchase of a tract of land and building thereon commonly known and designated as premises No. 1514 K Street, Northwest, Washington, District of Columbia, for the agreed purpose of managing controlling, leasing rooms therein for offices, and places of business, and ultimately reselling said building at a profit, which profit was to be shared and distributed by and between said defendants.

6. That pursuant to said co-partnership and the agreement between themselves the defendants obtained from the owner thereof a contract for the purchase of said premises upon the terms, as the plaintiff is informed and believes and therefore avers as follows: at and for the price of One Hundred and Twenty Five Thousand Dollars (\$125,000.00) of which there would be a cash payment of Twenty Thousand Dollars (\$20,000.00) and the balance would be provided for by the assumption by the defendants or whom-

soever they might designate to take title, of the then existing liens and incumbrances on and against said land and premises, amounting to a sum equal to said unpaid purchase money. That pending the payment of said cash balance of Twenty Thousand Dollars (\$20,000.00) the parties to said contract agreed to and did place the deed conveying said premises in the hands of a person not a party to said transaction, in escrow, the delivery of said deed to the defendant being conditioned upon the payment of said sum of Twenty Thousand Dollars (\$20,000.00). That said deed did not purport to convey said property to the defendants or either of them, but to another party unknown to the plaintiff, it being understood and
3 agreed that said other party should take title for the use and benefit of the defendants and as their agent under conditions described in the real estate parlance as a "straw man."

7. That pursuant to said contract of purchase the defendants did pay the sum of Ten Thousand Dollars (\$10,000.00) to the purchaser but were unable or unwilling to raise the additional Ten Thousand Dollars (\$10,000.00) necessary to consummate said transaction. That thereafter said defendants being unable or unwilling, to raise the said sum approached the plaintiff by and through the defendant Otto B. McLean, acting as the duly authorized agent of said partnership and joint adventurers and asked the plaintiff to invest the sum of Ten Thousand Dollars (\$10,000.00) in said enterprise, and promised and agreed to repay the plaintiff said sum and one-third of the profits which would be realized from said venture.

8. That on to wit the 28th day of February, 1927, the plaintiff relying upon said representations paid to the defendants said sum of Ten Thousand Dollars (\$10,000.00) upon the terms and conditions aforesaid and did thereby become and was a co-partner and joint adventurer with said defendants in said enterprise and entitled to receive her proportionate share of the profits therefrom.

9. That by the receipt of said sum of money from the plaintiff the defendants were enabled to consummate said transaction, and did thereafter receive from time to time sums of money as revenues, from said building, by way of rentals and other sources therefrom in amounts unknown

to the plaintiff. That thereafter said premises were re-sold by the defendants the price being unknown to the plaintiff, but she is informed and believes and therefore avers at a large profit.

10. That said plaintiff has not received from the defendant or either of them, the said sum of Ten Thousand Dollars (\$10,000.00), or any sums received by said defendants by way of revenues from said building, or profits arising from said transaction, or any sum whatsoever and said defendants have severally and finally refused to pay the plaintiff the said sum or sums or to account to her after demand concerning the same.

Wherefore, the premises considered, the plaintiff prays,

1. That process may issue to the defendants requiring each of them to appear and answer the exigencies of this Bill of Complaint.

2. That the defendants and each of them may on their several oaths answer this bill and discover and set forth in detail the amount of money received by them or either of them on account of said transaction.

3. That an accounting be had between the plaintiff and the defendants and that such decree may be entered against the defendants or either of them as the court may require, for such sum or sums of money as may be found to be due the plaintiff by reason of the matters and things hereinbefore set forth.

4. That the plaintiff may have such other and further relief as the nature of the case may require.

MAUDE S. MCLEMORE.

EDMUND BURKE,

LUCIUS Q. C. LAMAR,

Attorneys for Plaintiff.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Edmund Burke, being first duly sworn on oath, deposes and says that he is the Attorney for Maude S. McLemore, the Plaintiff in the above entitled cause and that said Plaintiff is absent from the District of Columbia. That he has read the foregoing amended bill of complaint and knows the contents thereof and verily believes the facts stated therein to be true.

EDMUND BURKE.

Subscribed and sworn to before me this 2d day of Dec., 1930.

[SEAL.]

GEORGE ELLIS WOOD,
Notary Public, D. C.

MAUDE S. McLEMORE.

Subscribed & sworn to before me this 12th day of January, A. D. 1931.

FRANK E. CUNNINGHAM,
Clerk,

By H. B. DERTZBAUGH,
Asst. Clerk.

6 *Separate Answer of the Defendant John F. Maury to the Second Amended Bill of Complaint.*

Filed January 16, 1931.

* * * * *

To the Supreme Court of the District of Columbia, holding an equity court:

The defendant, John F. Maury, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said second amended bill of complaint contained, for separate answer thereto, states as follows:

1. He admits the allegations of the first paragraph of said bill, except that he says he was not a co-partner or co-adventurer with the defendant Otto B. McLean.

2. He admits that the defendant Otto B. McLean is a citizen of the United States and was formerly a resident of the District of Columbia, but denies that the said defendant McLean was at any time a co-partner of this defendant.

3. He admits the allegations of the third paragraph of said bill, except that he denies that this defendant was a co-partner of the defendant McLean.

7 4. He denies the allegations of the fourth paragraph of said bill and says that no partnership ever existed between this defendant and the defendant McLean.

5. He denies the allegations of the fifth paragraph of said bill.

Further answering said fifth paragraph, this defendant says that he purchased on the 11th day of December, 1926, a one-third undivided interest as a tenant in common with the defendant McLean and with Frank B. Ghiselli, each of whom was also the owner of a one-third undivided interest, as tenants in common, in and to the premises No. 1514 K Street, Northwest; and this defendant denies that any partnership or joint adventure existed between him and said defendant McLean and with said Ghiselli or either of them.

6. This defendant denies the allegations of the sixth paragraph of said bill.

Further answering said sixth paragraph, this defendant states that on or about the 11th day of December, 1926, the said Otto B. McLean requested this defendant and Frank B. Ghiselli to join him in the purchase of the premises No. 1514 K Street, Northwest, in the City of Washington; that this defendant delivered to the said McLean the sum of Eight Hundred and thirty-three dollars and thirty-three cents (\$833.33) as part payment for a one-third interest in the proposed purchase and the said Ghiselli likewise delivered to the said McLean the like sum of Eight hundred and thirty-three dollars and thirty-three cents (\$833.33) as part payment for a one-third interest in the proposed purchase, and the said defendant McLean made a deposit of Two thousand five hundred dollars (\$2,500.00), which was a part of the purchase price, with the then owner of said property No. 1514 K Street, Northwest, and obtained a

8 written contract from said owner agreeing to sell said property to Harvey L. Randall; that the said Randall on the same day, to wit, December 11, 1926, assigned the said contract of purchase to the said McLean, said Ghiselli, and this defendant as actual purchasers of the property, in equal shares; that the said contract provided, among other things, that the property was sold for Ninety-three thousand two hundred and five dollars (\$93,205.00), subject to a first deed of trust of Fifty thousand dollars (\$50,000.00) and a second deed of trust of Twenty-three thousand two hundred and five dollars (\$23,205.00) and a cash payment of Twenty thousand dollars (\$20,000.00), and that the said sale should be consummated within sixty days; that thereafter, to wit, on the 16th day of February, 1927, Julius I. Peyser, for and in behalf of

his wife Miriam I. Peyser, paid and delivered to the said McLean, with the consent of this defendant and of said Ghiselli, the sum of Five thousand dollars (\$5,000.00) for a one-fourth undivided interest in and to the said property and on the same day the said Ghiselli paid to the said McLean a like sum of Five thousand dollars (\$5,000.00) for a one-fourth undivided interest therein; and shortly thereafter this defendant and the said McLean on, to wit, the 23rd day of February, 1927, borrowed from the said Peyser, or from a banking institution of which he was an officer, the sum of Ten thousand dollars (\$10,000.00) represented by a promissory note made by Harvey L. Randall and endorsed by this defendant and by the said defendant McLean, and that the said sum of Ten thousand dollars (\$10,000.00) so borrowed and represented by said note was paid to the vendor of said property as a part of the cash purchase price thereof and said Peyser received two of the four notes secured by a third deed of trust upon said property in the total amount of Twenty thousand dollars (\$20,000.00), represented by four promissory notes dated February 9, 1927, of Five thousand dollars (\$5,000.00) each, two of said Five thousand dollar (\$5,000.00) notes being attached to the aforementioned note for Ten thousand dollars (\$10,000.00), which was endorsed by this defendant and by the said defendant McLean, one of said Five thousand dollar (\$5,000.00) notes being the property of this defendant and the other being the property of the said McLean and held as collateral security for the payment of said Ten thousand dollar (\$10,000.00) obligation, and the remaining two notes of Five thousand dollars (\$5,000.00) each were delivered and made payable to the said Miriam I. Peyser and the said Ghiselli to represent their respective one-fourth interests in the cash purchase price of the property; and the legal title to said property was thereupon placed in Julius I. Peyser as Trustee for Miriam I. Peyser, his wife, one-fourth; for the said defendant McLean one-fourth; for the said Ghiselli one-fourth and for this defendant one-fourth; as tenants in common, subject to the said three deeds of trust.

7. For answer to the seventh paragraph of said bill this defendant denies the allegations thereof; and this defendant denies that the purchasers of said property were unable

or unwilling to raise any portion of the purchase price of said property; and he denies that the defendant McLean was the agent of this defendant; he denies that he was a partner or joint-adventurer with said defendant McLean; he denies that the said defendant McLean was in any manner authorized or empowered to make any such alleged agreement with the plaintiff; he denies that he directly or indirectly borrowed or received from the plaintiff the sum of Ten thousand dollars (\$10,000.00) or any other sum of money upon any agreement made with her directly or indirectly whereby he is alleged to have promised and agreed to return the said sum and one-third of the profits arising from the purchase and sale of said property, or for any interest in the said property or in any profits arising therefrom.

10 8. This defendant denies the allegations of the eighth paragraph of said second amended bill, and he denies that the plaintiff paid to this defendant or to this defendant and the said defendant McLean, the sum of Ten thousand dollars (\$10,000.00), or any other sum of money whatsoever; and he denies that the plaintiff paid the sum of Ten thousand dollars (\$10,000.00) to the defendants and that she thereby, or in any manner, did become or was a co-partner and joint adventurer with the defendants; or acquire or have any right, title or interest in and to the said property: to the contrary, this defendant says that the said property was acquired, purchased and paid for by the said defendant McLean, this defendant, the said Ghiselli and said Peyser, as tenants in common, in equal one-fourth shares, and that the same was bought and paid for with the moneys of said McLean, Ghiselli, Peyser and this defendant, as set forth in the sixth paragraph of this answer; and that the said property was conveyed to said Julius I. Peyser by deed bearing date on, to wit, the 17th day of February and recorded February 18, 1927 in Liber No. 5960 at folio 350 of the Land Records of said District, and the said Peyser, Trustee, executed and delivered on February 17, 1927, to each of the said Miriam I. Peyser, Frank B. Ghiselli, the defendant McLean and to this defendant a declaration of trust reciting that he, said Peyser, held the title to said property in trust for the said four named persons, as tenants, in common, in the proportions of one-fourth each, as the contributors to the purchase money

thereof; and he denies that the plaintiff had or has any right, title or interest therein, or any interest in the profits that might have been or were derived therefrom.

9. This defendant denies the receipt of any sum of money from the plaintiff, and he denies that by the payment of any money by the plaintiff to this defendant the said purchase was consummated; this defendant denies that
11 any profit was received by him as revenue or rentals of said property, but he admits that the said property was sold and conveyed by the said Peyser, as Trustee, at a profit over the purchase price of said property, and says that he received his proportion of said profit, the said property having been sold for the sum of One hundred and ten thousand dollars (\$110,000.00).

10. Answering the tenth paragraph of said bill, this defendant admits that he has paid the plaintiff nothing whatsoever of the profits arising from said transactions, and that he has refused to pay her anything, because he owes her nothing whatsoever, and never had any knowledge or notice that the plaintiff claimed anything from him, or that she claimed or had any interest in said property or any claim of right to share in the profits thereof until the 11th day of March, 1930, a few days prior to the filing of the original bill of complaint herein.

Further answering said amended bill, this defendant says that he bought and paid for a one-fourth undivided interest, as tenant in common, in said property at No. 1514 K Street, Northwest, the title to which was taken in the name of said Julius I. Peyser, as Trustee; that this defendant paid in full the note given for the money borrowed from the said Peyser and used in the purchase of the one-fourth interest of the said defendant McLean, and this defendant thereafter became the owner of the one-fourth interest of said McLean by purchase and assignment for full value and this defendant also became the owner of the one-fourth interest of said Miriam I. Peyser by purchase for full value, and at the time of the sale and conveyance of said property by the said Peyser, this defendant was the owner of a three-fourths
interest therein with the said Frank B. Ghiselli, who
12 was owner of the remaining one-fourth interest, as tenants in common, and this defendant was purchaser for full value without any knowledge, notice or informa-

tion that the plaintiff had or claimed any interest in said property or in the proceeds of sale thereof, or that the plaintiff had or claimed any lien thereon or any claim or right whatsoever in or to the said property, the proceeds of sale thereof or any part of the profits arising from the sale thereof.

Further answering said amended bill this defendant states that the title to said property was taken in the name of said Randall, who executed and placed upon the records the said third deed of trust thereon to secure said four notes of Five thousand dollars (\$5,000.00) each and immediately conveyed said property to said Julius I. Peyser in trust to hold the same for Miriam I. Peyser, Frank B. Ghiselli, this defendant and the defendant McLean, as tenants in common, to each of whom said Julius I. Peyser, Trustee, issued and delivered his declaration of trust; and one of said Five thousand dollar (\$5,000.00) notes was delivered to each of said tenants in common in evidence of the sums of Five thousand dollars (\$5,000.00) each had contributed to the purchase price of said property, the said two notes for Five thousand dollars (\$5,000.00) each belonging to this defendant and the defendant McLean being actually delivered to the said Julius I. Peyser as collateral security for the note of Ten thousand dollars (\$10,000.00) of said Randall endorsed by this defendant and by said McLean and which note for Ten thousand dollars (\$10,000.00), with interest, was afterwards paid by this defendant, the said defendant McLean paying no part thereof, and this defendant acquired the said note of Five thousand dollars (\$5,000.00) belonging to the said McLean without knowledge or notice of any defense thereto or outstanding equity, or of any claim of the plaintiff.

13 And this defendant further states that the full sum of Twenty thousand dollars (\$20,000.00) cash payment required according to the contract of sale was paid by the said four owners of the property, to wit: the said Miriam I. Peyser, Frank B. Ghiselli, this defendant and the defendant McLean, each paying Five thousand dollars (\$5,000.00) and so far as this defendant knew or had any knowledge, notice or information the total sum of Twenty thousand dollars (\$20,000.00) required to be paid for the purchase of said property in cash was actually paid by the said four parties and by no other person and this

defendant denies any knowledge, notice or information whatsoever as to the plaintiff paying any money to the said McLean or contributing to the purchase of said property in any manner whatsoever and this defendant denies that the said McLean or the said plaintiff ever informed him or any one connected with the said transaction that she had contributed any money thereto, the first knowledge, notice or information of any such alleged claim on behalf of the plaintiff having been made to this defendant on or about the 11th day of March, 1930, by the plaintiff's attorney.

Further answering said amended bill this defendant says that the said property was sold by said Julius I. Peyser, Trustee, to the Georgia Realty Company for One hundred and ten thousand dollars (\$110,000.00) on or about the month of March, 1928, and that this defendant having contributed and paid for his one-fourth interest in the property and having also purchased, paid for and become the owner of the one-fourth interest of the defendant McLean and having also purchased from the said Miriam I. Peyser her one-fourth interest in the property, this defendant was the owner at the time of said sale of a three-fourths undivided interest in said property, the said Frank B. Ghiselli being the owner of the remaining one-fourth interest, as tenants in common, and upon the sale of said property the said Julius I. Peyser, as Trustee, received Thirty-three thousand and eighty-nine dollars and nine cents (\$33,089.09), which included the Twenty thousand dollars (\$20,000.00) contributed by the four original tenants in common and of which amount this defendant received three-fourths and the said Ghiselli received one-fourth.

Further answering said amended bill this defendant says that the plaintiff ought not to have and maintain her said claim as alleged in her bill against him, because he says the same is barred by the Statute of Limitations and that if any action has accrued to her it was more than three years next before the bringing of this suit and, further, that the said plaintiff is barred by her laches from any relief in a court of equity: and, further, that this court has no jurisdiction in equity because the plaintiff has, if she is entitled to any relief at all, a plain, adequate and complete remedy at law; and this defendant says that the plaintiff has no right to maintain any case against him because the alleged contract

or agreement was not in writing as required by the statute of frauds; and, further, that the plaintiff has not made or stated in her said amended bill any such case as entitles her to any relief in this court against this defendant; and, further, because her said amended bill is defective for want of necessary parties, the said Julius I. Peyser, Trustee as aforesaid, Miriam I. Peyser and Frank B. Ghiselli.

And having fully answered, etc.

JOHN F. MAURY.

RALPH P. BARNARD,
GUY H. JOHNSON,

Attorneys for Defendant John F. Maury.

15 DISTRICT OF COLUMBIA, *To wit:*

I, John F. Maury, being first duly sworn on oath depose and say that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated of my own personal knowledge are true and those stated on information and belief, I believe to be true.

JOHN F. MAURY.

Subscribed and sworn to before me this 15th day of January, 1931.

[NOTARIAL SEAL.]

JOHN W. WOOD,
Notary Public, D. C.

16 *Order Calendaring Cause for Trial.*

Filed February 9, 1931.

* * * * *

The Clerk of said Court will calendar the above entitled cause for the next term of court.

L. Q. C. LAMAR,
Attorney for Plaintiff.

17 *Decree.*

Filed March 22, 1932.

* * * * *

This cause came on to be heard at this term of Court upon the pleadings and testimony, and having been argued by

counsel for the plaintiff and the defendant John F. Maury, and being submitted to and considered by the Court, it is, this 22nd day of March, A. D. 1932,

Adjudged, ordered, and decreed that the Second Amended Bill of Complaint filed herein be, and the same is hereby dismissed, with costs to the defendant John F. Maury.

DANIEL W. O'DONOGHUE,

Justice.

Mch. 22nd, 1932.

From this decree an appeal is noted to the Court of Appeals of the District of Columbia and bond fixed at \$100.00 or \$50.00 cash deposit.

DANIEL W. O'DONOGHUE,

Justice.

18

Finding- of Fact.

Filed March 24, 1932.

* * * * *

This cause came on to be heard at this term of Court upon the pleadings and evidence adduced by the respective parties, and the Court finds the facts to be as follows:

1. That on the 10th day of December, 1926, a written contract was entered into by which one Harry A. Kite, the then owner, agreed to sell a certain parcel of land in the City of Washington, District of Columbia, described as lot 810, square 199, improved by premises 1514 K Street, N. W., to Harvey L. Randall, for the sum of Ninety Three Thousand Two Hundred and five dollars (\$93,205.00), the purchaser being required to pay Twenty Thousand Dollars (\$20,000.00) in cash, the amount over and above the then existing encumbrance on said property, of which Twenty-five Hundred Dollars (\$2500.00) was paid at the time of the signing of the contract. And it was further provided by the contract that the purchaser was required to make full settlement within sixty (60) days from the date of acceptance of the contract by the owner, i. e. December 19 11, 1926. That the said Harvey L. Randall, in taking title to said property in his name was acting for and on behalf of Otto B. McLean, John F. Maury and Frank E. Ghiselli; the real parties in interest, each of the three par-

ties contributing one-third i. e. Eight Hundred Thirty-three Dollars and Thirty-three cents (\$833.33) of the aforesaid deposit of \$2,500.00. That settlement was not made within the sixty day period provided in the said contract and that settlement was actually made on February 28, 1927.

That prior to the date of settlement Julius I. Peyser, purchased a one-fourth interest in said property in the name of his wife with the consent of the other parties and on the 16th day of February, 1927, he paid Otto B. McLean the sum of Five Thousand Dollars (\$5000.00) and on or about the same date Frank E. Ghiselli paid the defendant Otto B. McLean the sum of Five Thousand Dollars (\$5000.00), both payments being made with the knowledge and consent of the defendant John F. Maury and about the same date or shortly thereafter the said Maury, McLean and Ghiselli each received back the amount of their respective deposit i. e. \$833.33.

That on or about February 23, 1927, John F. Maury and Otto B. McLean borrowed the sum of Ten Thousand Dollars (\$10,000.00) from the Security Savings and Commercial Bank, and gave their joint promissory note to said bank in said sum; that thereupon said sum was placed to the credit of Julius I. Peyser and on February 24, 1927, the said Peyser made his check payable to the order of the Columbia Title Company in said sum of \$10,000.00 and caused same to be delivered to the said Title Company, said check representing the proceeds of said loan and the same was a part of the purchase money paid for said property as shown by the records and accounts of said Title Company. That on the 24th day of February, 1927, the said Otto B. McLean gave his check drawn on the District National Bank payable to the said Title Company in the
20 sum of Seven Thousand Seven Hundred Thirty-Four Dollars and Twenty-seven cents (\$7734.27) but said check was not paid by the bank on which it was drawn.

That on the 28th day of February, 1927, the defendant Otto B. McLean told the plaintiff that she would have a one-fourth interest in the purchase and resale of premises 1514 K Street, Northwest, for the sum of \$10,000.00 and on the same date the plaintiff Maude S. McLemore at the instance of the Defendant Otto B. McLean withdrew the sum of \$10,000.00 from W. B. Hibbs & Co., by two checks payable to her order, one in the sum of \$7800.00 and the other

in the sum of \$2200.00. That she endorsed the check for \$7800.00 to the Columbia Title Company and went on the same day to the said Title Company together with the defendant McLean, Harvey L. Randall, Ralph Benton and Martin J. Quigley, the last three being employees of Maury-McLean Inc., and caused said check to be deposited with said Title Company. That said sum of \$7800.00 formed a part of the purchase price of said property as appears from the record and accounts of said Title Company. The Court finds that this payment was without the knowledge of Maury, Peyser or Ghiselli. That said check of \$2200.00 did not go to the said Title Company but was endorsed in blank by her and delivered to Otto B. McLean who endorsed same to the defendant John F. Maury who endorsed and deposited same to his account. That on the 28th day of February, 1927, the said McLean was indebted to the defendant John F. Maury for more than \$2200.00 and that said check of \$2200.00 was applied by the said John F. Maury in part payment of said indebtedness without the knowledge of the plaintiff. That thereafter on the same date after the \$7800.00 had been paid into the Title Company and the transaction had been closed, the plaintiff

McLemore stated she wanted something to show her
21 interest in the deal and thereafter McLean gave her a note dated February 28, 1927, payable to her order on demand in the sum of \$10,000.00 which note has not been paid.

2. That final settlement was made at the Columbia Title Company on February 28, 1927, and the owner Harry A. Kite conveyed the property to Harvey L. Randall and thereupon said Harvey L. Randall executed three deeds of trust, one to secure the sum of Fifty Thousand Dollars (\$50,000.00), the second to secure the sum of Twenty-three Thousand Two Hundred and Five Dollars (\$23,205.00), and the third to secure the sum of Twenty Thousand Dollars (\$20,000.00) purporting to represent the equity of the said McLean, Maury, Ghiselli and Peyser in said property and thereafter the said Harvey L. Randall conveyed said property by deed to Julius I. Peyser, Trustee, who executed a declaration of trust declaring that he held the title to said property in trust one-fourth interest for himself and one-fourth each for Otto B. McLean, John F. Maury and Frank E. Ghiselli; that said Julius I. Peyser thereupon took charge

of the property, rented the same and called for payments from the said McLean, Maury, Ghiselli and Peyser during the time the property was held for deficiency in taxes, interest on the encumbrances, insurance and other carrying charges.

3. Thereafter in March, 1928, the defendant John F. Maury exchanged his one-third interest in 1516 K Street, Northwest, Washington, D. C., for Julius I. Peyser's one-fourth interest in 1514 K Street, Northwest. That by a memorandum dated March 5, 1928, the said Otto B. McLean assigned his interest in the property to John F. Maury. That the said Maury curtailed said loan from time to time by giving renewal notes and eventually paid off the obligation, the exact date of final payment not being known.

22 4. That on the 26th day of March, 1928, a contract was entered into by and between Julius I. Peyser, Trustee, and Georgia Industrial Realty Company for the purchase by said Company of the property 1514 K Street, Northwest, for the price of One Hundred and ten thousand dollars (\$110,000.00), less an allowance of One Thousand Dollars (\$1,000.00) and Three thousand four hundred Dollars (\$3,400.00) commission and said Julius I. Peyser, Trustee, delivered to the District Title Insurance Company said four notes for Five Thousand Dollars (\$5,000.00) each, secured by a third deed of trust on 1514 K Street, Northwest, and he thereupon received a check in settlement of the sale for Thirty-three thousand and eighty-nine dollars and nine cents (\$33,089.09), which he endorsed over to the defendant John F. Maury, who immediately delivered one-fourth thereof to Frank E. Ghiselli plus Two Hundred Dollars (\$200.00), being one-fourth of the deposit and certain rents in the hands of the Trustee.

The Court finds that the defendants John F. Maury and Otto B. McLean were coadventurers but not partners in this transaction and further finds that the plaintiff Maude S. McLemore delivered her check for the sum of Seven Thousand eight hundred Dollars (\$7,800.00) on February 28, 1927, which formed part of the purchase money for the said property. The Court further finds that the plaintiff has failed to prove knowledge on the part of the defendant John F. Maury of the transaction between the defendant McLean and the plaintiff McLemore or had knowledge that said Seven thousand eight hundred dollars (\$7,800.00) of

the plaintiff formed a part of the purchase money for the said property.

23 The Court is of the opinion that the defendant John F. Maury is not bound by the acts of his co-adventurer Otto B. McLean without knowledge on the part of the defendant, Maury.

DANIEL W. O'DONOGHUE,
Justice.

Memoranda.

April 13, 1932.—\$50 deposited in lieu of bond for costs on appeal.

April 14, 1932.—Statement of Evidence filed.

24 *Assignment of Errors.*

Filed September 29, 1932.

* * * * *

The plaintiff, Maude S. McLemore, for cause of appeal from the decree dismissing the Second Amended Bill of Complaint, states that the Court erred as follows:

1. In dismissing said Second Amended Bill of Complaint.
2. In holding that under the evidence the plaintiff was not entitled to a money decree against the defendant, John F. Maury.
3. In holding that under the evidence the plaintiff was not entitled to have an accounting between the defendant, John F. Maury, and the plaintiff.
4. In holding that under the evidence there was no money due the plaintiff from the defendant, John F. Maury.
5. In finding that under the evidence that the defendant, John F. Maury, had no notice nor knowledge of the transaction of the defendant, Otto B. McLean, with the plaintiff referred to in said Bill of Complaint.
6. In failing to hold that the defendants, Otto B. McLean and John F. Maury, were co-partners at the time of the transaction referred to in said Second Amended Bill of Complaint.
7. In failing to hold that under the evidence the defendant, John F. Maury, was bound by the transaction and con-

tract of the said Otto B. McLean with the plaintiff referred to in said Bill of Complaint.

25 8. In ruling, as a matter of law, that one adventurer is not bound by the acts of his co-adventurer, within the scope of said adventure, without the knowledge of the former.

9. In failing to hold that even though the defendant, John F. Maury, was not bound by the act of the defendant, Otto B. McLean, that the said Otto B. McLean had sold or assigned his interest in the property and in the enterprise to the plaintiff, and, therefore, that the plaintiff was entitled to McLean's interest in the proceeds of the sale of the property referred to in said Bill of Complaint.

L. Q. C. LAMAR,
AUBREY B. FENNELL,
Attorneys for Plaintiff.

26 *Order Extending Time to File Transcript.*

Filed September 30, 1932.

Court of Appeals of the District of Columbia, April Term,
1932.

No. 1978, Original.

MAUDE S. MCLEMORE, Petitioner,

vs.

JOHN F. MAURY and OTTO B. MCLEAN.

On consideration of the petitioner's motion in the above entitled cause for an extension to and including October 1, 1932 in which to file the transcript of record in this Court, It is by the Court this day ordered that said motion be, and the same is hereby, granted.

Per Mr. CHIEF JUSTICE MARTIN,
August 2, 1932.

A true Copy. Test:
[SEAL.]

HENRY W. HODGES,
*Clerk of the Court of Appeals
of the District of Columbia.*

Memorandum.

October 7, 1932.—Statement of evidence signed (in duplicate) and filed.

27 *Order Further Extending Time to File Transcript.*

Filed October 11, 1932.

Court of Appeals of the District of Columbia, — Term,
1932.

No. 1978, Original.

MAUDE S. MCLEMORE, Petitioner,

vs.

JOHN F. MAURY and OTTO B. MCLEAN.

On consideration of the petition for a further extension of time to and including November 1, 1932, within which to file the transcript of record in the above entitled cause in this Court,

It is by the Court this day ordered that said petition be and it is hereby granted and the time extended as prayed.

Per MR. CHIEF JUSTICE MARTIN,

October 8, 1932.

A true copy. Test:

[SEAL.]

HENRY W. HODGES,

Clerk Court of Appeals, D. C.

28

Designation of Record.

Filed September 29, 1932.

* * * * * * *

It is stipulated between counsel for the respective parties that the transcript of record on appeal from the decree dismissing the bill in the above entitled cause shall include therein the following:

Second Amended Bill of Complaint.

Answer to Second Amended Bill of Complaint.

Order to Calendar.

Opinion of Court. (See Statement of Evidence.)

Finding of Facts.

Final Decree Dismissing Bill.

Memorandum of Deposit for Costs.

Statement of Evidence and Exhibits.

Assignment of Errors.

This Designation of Record.

L. Q. C. LAMAR,

AUBREY B. FENNELL,

Attorneys for Plaintiff.

RALPH P. BARNARD,

Attorney for Defendant Maury.

29 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 28, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51219 in Equity, wherein Maude S. McLemore is Plaintiff and John F. Maury et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 31st day of October, 1932.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,

Clerk.

30 In the Supreme Court of the District of Columbia,
Holding an Equity Court.

Equity. No. 51219

MAUDE S. MC LEMORE, Plaintiff,

vs.

OTTO B. MC LEAN et al., Defendants.

Statement of Evidence.

Be it remembered that the above entitled cause came on for hearing on the 22nd day of March, 1932, before the Hon-

orable Daniel W. O'Donoghue, Associate Justice of the Supreme Court of the District of Columbia, holding an Equity Court, there being present the plaintiff and the defendants with their counsel.

Whereupon the plaintiff, to maintain the issues upon her part joined, introduced in open court the following testimony:

Maude S. McLemore testified that she is the plaintiff in this suit. That she is a widow, and resides in Washington, D. C. That she first met the defendant, Otto B. McLean, in 1924, and that she had known the defendant, John F. Maury, since he was a boy five or six years of age.

That Maury and McLean were engaged in the real estate business, as partners, in 1927. That she had a business transaction in 1927.

Asked to state what this transaction was, witness replied:

31 "Mr. McLean of the firm approached me about going into an investment in a building at 1514 K Street with the idea that it was a good investment for me and he represented that there were only four persons in it, Mr. Maury, himself, Mr. Ghiselli, and myself."

That McLean first approached her in November, 1926. At that time she took no action. She told him what little she had was yielding a fair return. He talked about it on several different occasions and urged it very strongly, always with the idea that it would be very beneficial to her and the investment was a good one, that the purpose of acquiring this property was to resell it to the Southern Railway. That the Southern Railway was going to acquire the block in which this property was located as part of a site for its new building. That McLean wanted her to go into the transaction and to put up Ten Thousand Dollars (\$10,000) of the purchase money necessary to buy the property, and that she would have a one-fourth interest in the property and in the profits made on the transaction. She made some investigation, herself from friends who were connected with the Southern Railway and received information that the site at 15th & K Streets "was considered most favorable", so, after thinking it over, she took Ten Thousand (\$10,000) Dollars out of Hibbs and Company in the latter part of

February, 1927. She has never received any of the funds which she invested in this property from Maury or McLean or from any other source, nor has she received any of the profits made from the resale of the property.

Asked concerning the money she invested, witness said:

32 "I went down to Hibbs and drew out Ten Thousand (\$10,000) Dollars. Mr. McLean said to me—he went with me. It was in the morning before twelve o'clock and as I was getting out of the car Mr. McLean asked me to get the money in two checks, one for Seven Thousand Eight Hundred (\$7,800) Dollars, and one for Two Thousand Two Hundred (\$2,200) Dollars, just as I was getting out of the car. I didn't question it. I thought it was perfectly all right and so I did as I was told. I got the checks and came back to the car and went down to the Title Company and saw the checks deposited there."

This Title Company was at the corner of E and 5th Streets. She did not go into the Title Company but gave the checks to McLean and he went into the Title Company with them. She identified the two checks which were admitted in evidence, plaintiff's exhibits Nos. 1 and 2, excerpts of which are hereto attached and made a part of this statement of the evidence, marked plaintiff's exhibits Nos. 1 and 2. On her trip to the Title Company she was accompanied by McLean, a Mr. Quigley and Ralph Benton; that Ralph Benton has since died. She handed the checks to McLean as she got into the car. The transaction was done hurriedly because the money had to be into the Title Company by noon.

Cross-examination:

Asked what form of receipt was given by McLean, witness said:

"I was very well satisfied having gone down and saw the money put into the Title Company—that was perfectly legitimate. I said "life is very uncertain and what protection will my daughter have if anything should happen to me to know that I have this money in this transaction?"

That he said "if you feel better about that I will give you my personal note and you can explain to Dorothy about this deal."

33 Q. You handed them (checks) to Mr. McLean. A. Yes.

* * * * *

And went down to the Title Company and I don't think I went into the Title Company. Mr. Benton went in. Mr. McLean went in. Mr. McLean handed these checks over when we got in front of the Title Company to Mr. Benton and told him to deposit them.

Q. You didn't have any word from Mr. Maury that he was in this transaction did you? A. No. No.

Q. Did you ever ask personally Mr. Maury anything about this matter? A. No, I did not.

34 That McLean gave her his note, payable on demand, which was offered in evidence, marked defendants' exhibit A, which is hereto attached and made a part of this statement of the evidence, marked plaintiff's exhibit No. 3. That she did not receive a contract or any other paper showing that she had an interest in this property.

On cross-examination she was asked whether she ever made a demand upon him for Ten Thousand (\$10,000) Dollars; witness replied:

"No, I didn't regard that note. I thought that was just a protection in case anything happened to me. I was perfectly satisfied. I was not a business woman."

That she did not intend to lend McLean this money and that she would not have put the money into the transaction except for the fact that she knew Maury and knew of Ghiselli. That she has never made demand upon Maury for the payment of the money except through her attorneys just before filing suit.

James C. Elgin testified that he was employed by W. B. Hibbs & Company. That he had brought with him from the files of that Company the two cancelled checks, payable to the order of Maude S. McLemore, admitted in evidence as plaintiff's exhibits Nos. 1 and 2, and identified them as the checks of that company.

Herbert Carroll testified that he was employed by the firm of Boss & Phelps, real estate brokers of this city; that he had brought with him from the files of Boss & Phelps the contract of sale, dated December 10, 1926, between Harry A. Kite, seller, and Harvey L. Randall, purchaser, which contract of sale related to premises 1514 K Street, N. W., and he identified the contract which was admitted in evidence, the substance and effect of which contract, together with pertinent excerpts therefrom, is hereto annexed and made a part of this statement of the evidence, marked plaintiff's exhibit No. 4.

Charles A. Marsh testified that he is an official of the Real Estate and Columbia Title Insurance Company of this city and that he was an official of that Company in February, 1927. That on February 28, 1927, settlement was made, in the office of that Company, pursuant to the contract offered in evidence. The witness identified the settlement records in that case, including the settlement sheet, which was admitted in evidence, the substance of which is attached hereto and made a part hereof, marked plaintiff's exhibit No. 5. That the records of the Title Company show that a check of W. B. Hibbs & Company, dated February 28, 1927, in the sum of Seven Thousand Eight Hundred (\$7,800) Dollars, drawn on the Riggs National Bank, payable to the order of Maude S. McLemore and endorsed by her, was received by the Title Company on February 28, 1927, and was credited by the Title Company as part of the purchase money in this settlement.

That the records of the Title Company also show that that Company received a check, dated February 24, 1927, for Ten Thousand (\$10,000.00) Dollars, drawn by Julius I. Peyser, payable to the order of said Title Company, and that this sum was credited as part of the purchase money in this settlement, copy of pertinent parts of said check is hereto attached and made a part hereof, marked plaintiff's exhibit No. 6. That the Two Thousand Five Hundred (\$2,500) Dollar credit recited in said settlement represented the cash deposit at the time of the contract and was not received by said Title Company. The records also show a check of Otto B. Mc-

Lean, payable to the Title Company, for Seven Thousand Seven Hundred Thirty-Four and 27/100 (\$7,734.27) Dollars, dated February 24, 1927. This check was not paid by the bank on which it was drawn.

William W. White testified that he is an employee of the District, Lawyers and Washington Title Insurance Companies. He produced the records of these Companies showing the chain of title to 1514 K Street, N. W., which chain of title showed the following:

Deed, dated February 9, 1927, from Harry A. Kite to Harvey L. Randall.

Deed in trust, dated February 24, 1927, from Harvey L. Randall to Julius I. Peyser, Trustee, to secure "such persons as have contributed to the purchase of said property, their heirs and assigns, as tenants in common according to the amounts contributed by each."

Deed, dated March 4, 1927, from Peyser Trustee, to Randall, and deed of trust of the same date from Randall to Ganss and Peyser, Trustees, to secure payment of four notes of Five Thousand (\$5,000) Dollars each, payable to H. W. Dure.

Deed in trust from Randall to Peyser of the same date, in trust for the sole use of such persons who have contributed to the purchase of said property.

37 Deed, dated March 17, 1928, from Peyser, Trustee, to the Georgia Industrial Realty Company.

Deed of release, dated April 5, 1928, from Ganss and Peyser to Georgia Industrial Realty Company releasing deed of trust from Randall to Ganss and Peyser.

This witness produced and identified from said records a settlement sheet of the sale of said property, dated March 26, 1928, from Julius I. Peyser to the Georgia Industrial Realty Company, a check in settlement from the District Title Company, dated March 29, 1928, for Thirty-Three Thousand Eighty-Nine and 09/100 (\$33,089.09) Dollars, payable to the order of Julius I. Peyser, Trustee, and endorsed by him and John F. Maury, respectively; the four notes from Harvey L. Randall to Ganss and Peyser, Trustees, secured by the deed of trust of March 4, 1927, which notes were marked "paid and cancelled", all of which docu-

ments were admitted in evidence. The pertinent parts of the check of the Title Company and the settlement sheet are hereto attached and made a part hereof marked Exhibits Nos. 7 and 8, respectively.

Julius I. Peyser testified that this property was first brought to his attention by John O'Brien, who was employed by Maury and McLean or Maury-McLean Company. From that time on his transactions were entirely with Mr. Maury except once in a while he would discuss the matter with Mr. McLean. They suggested that he purchase a one-fourth interest in this property and he ultimately did so, paying Five Thousand (\$5000) Dollars for this interest. He produced his cancelled check, payable to the order of Otto B. McLean, which was offered in evidence, pertinent portions of which are hereto annexed and made a part hereof, marked plaintiff's exhibit No. 9.

38 That Maury and McLean at that time were partners in the real estate business. That he understood that he, Maury, McLean and Frank E. Ghiselli were jointly interested in the enterprise, each having a one-fourth interest in the property, and each would receive one-fourth of the net proceeds of the sale, and that each of the parties were special partners.

That subsequent to February 18, 1927, Maury and McLean needed funds to complete the purchase and Peyser secured a loan of Ten Thousand (\$10,000) Dollars for them from the Security Savings & Commercial Bank. This sum was placed to his (Peyser's) account and he paid this money to the Columbia Title Company by check, payable to the order of that Company, dated February 24, 1927, pertinent excerpts of which have heretofore been annexed and made a part hereof, marked plaintiff's exhibit No. 6. That this loan was evidenced by a note of Harvey L. Randall, payable to the order of John F. Maury and Otto B. McLean and endorsed by them, which was curtailed and renewed from time to time and eventually paid by John F. Maury, pertinent excerpts of which are hereto annexed and made a part hereof, marked plaintiff's exhibit No. 11. This was merely a loan and he, Peyser, did not acquire any additional interest in the property or enterprise.

That he took title to the property in trust for those who had contributed to the purchase money, and thereafter he made

a written declaration of trust in favor of John F. Maury, Otto B. McLean, Frank E. Ghiselli and Miriam I. Peyser, his wife. That after the property was deeded to him he reconveyed it to Randall who placed a third deed of trust on it to secure the four notes of Five Thousand (\$5000) each, payable to Dure, who was a straw man. Dure endorsed the notes to each of these four parties and the notes represented the capital invested by each. That the property was conveyed back to him by a deed in trust and he held title to the same until it was resold to the Georgia Industrial Realty Company in 1928. During this period he collected rents of approximately Three Thousand (\$3000) Dollars, and paid the taxes and interest on the first and second deeds of trusts, which expenses were slightly in excess of the income derived from the property. That he did not have the exact figures of income and expenses. That in March, 1928, he traded his one-fourth interest in 1514 K Street to John F. Maury for a one-third interest in 1516 K Street, owned by Maury, and thereafter had no property interests in 1514 K. Street. Witness identified an informal assignment, dated March 5, 1928, from McLean of his one-fourth interest in said property, to John F. Maury. That about the time of the resale in March, 1928, he received the check of the District Title Company for Thirty-Three Thousand Eighty-Nine and 09/100 (\$33,089.09) Dollars, payable to him as trustee. He identified plaintiff's exhibit No. 7 as being the check that he received and testified that he endorsed this check to Maury to make distribution.

Frank E. Ghiselli testified that he was Vice-President of the Merchants Bank & Trust Company in 1926 and 1927. In December, 1926, Otto B. McLean approached him and asked him to participate in a transaction involving the purchase and resale of 1514 K Street, N. W.; that at that time John F. Maury and McLean were engaged in the real estate business in Washington, D. C. A cash deposit of Two Thousand Five Hundred (\$2,500) Dollars was required under the contract of purchase and the proposition was submitted to him that he, Maury and McLean would each put up one-third of the deposit or Eight Hundred Thirty-Three and 33/100 (\$833.33) Dollars, and that each of them would afterwards put up one-third of the

cash purchase money required to consummate the purchase and that each of said parties would acquire a one-third interest in the property and in the proceeds from the resale of the property. He discussed this matter frequently with both Maury and McLean and agreed to go into the deal with them. He gave his check for Eight Hundred Thirty-Three and 33/100 (\$833.33) Dollars, payable to McLean. That later on he agreed to allow Julius I. Peyser to participate in the enterprise for a one-fourth interest. That Peyser was to put in Five Thousand (\$5000) Dollars and that each of the parties would put in the same amount and each would receive a one-fourth interest in the property and in the proceeds from resale. He agreed to this and on February 16, 1927, gave his check for Five Thousand (\$5000) Dollars to Otto B. McLean in payment of his portion of the purchase money, with the knowledge and consent of John F. Maury. At or about that time he received back Eight Hundred Thirty-Three and 33/100 (\$833.33) Dollars, the amount originally paid by him. In April, 1928, he received a check from John F. Maury for Eight Thousand Four Hundred Seventy-Two and 27/100 (\$8,472.27) Dollars, which Maury told him represented the amount invested by him of Five Thousand (\$5000) Dollars and one-fourth of the profits realized from the resale of the property.

41 **Miss Minnie L. Ruppert** testified that she was employed by the McLean Company first in the fall of 1926 and afterwards by Maury and McLean. She worked there in the latter part of 1926, about December and the first part of 1927. That sometime during this period Maury and McLean were engaged in a general real estate business and they were incorporated and she kept the minute book. That she had frequently seen Mrs. McLemore in the office and knew her by sight.

Guy Birckhead testified that in December, 1926, and January and February of 1927, he was a salesman for Boss & Phelps, real estate agents of Washington, D. C. That they represented Harry A. Kite, the original owner, in the sale of this property in 1926. He identified the contract of sale, dated December 10, 1926, from Harry A. Kite to Harvey L. Randall. On or about February 10, 1927, when the

sixty day period specified in the contract for making settlement had expired, the owner, Harry A. Kite, repeatedly asked him why the settlement was not closed and that from February 10th to February 28, 1927, he frequently communicated with the office of Maury and McLean, inquired why the settlement was not made, and informed that office that Kite said it was necessary to close the transactions. That his conversations were usually with John A. O'Brien, who was in the employ of Maury and McLean.

John A. O'Brien testified that in 1926 he was first an employee of Otto B. McLean. That in the latter part of that year, or the first part of 1927, John F. Maury became associated in the real estate business with McLean, that they incorporated under the name of Maury & McLean, Inc., and that he was made an officer of that Company. That he was familiar with the transactions involving the purchase of 1514 K Street. That Guy Birkhead, of
42 the firm of Boss & Phelps, agents for Harry A. Kite, original owner of the property, frequently brought to his attention the fact that the sixty days provided in the contract for closing the transaction had expired and that Kite insisted settlement be made without delay and that he brought this information to the attention of McLean.

Martin J. Quigley testified that in February, 1927, he was an official of Maury & McLean, Inc., and that he was also settlement clerk for the firm. That he was familiar with the purchase and resale of premises 1514 K St., N. W. by Maury and McLean, Ghiselli and Peyser. That he knew Mrs. McLemore by sight and had frequently seen her in the office of Maury and McLean during the period of this transaction.

That on the morning of February 28, 1927, at McLean's request, he went with McLean and Mrs. McLemore, in company with Ralph Benton and Harvey L. Randall, both employees of Maury and McLean, from the office of Maury & McLean to W. B. Hibbs & Company where Mrs. McLemore received two checks of W. B. Hibbs & Company, payable to her order, one for Seven Thousand Eight Hundred (\$7,800), and the other check for Two Thousand Two Hundred (\$2,200) Dollars. That they all then went to the Columbia Title Company at 5th and E Sts., N. W., and that McLean

and Mrs. McLemore took the checks received from Hibbs & Company into the office of the Title Company.

Paul Price testified that he was an employee of Otto B. McLean in 1926, 1927, and 1928. That he spent a large part of his time in the real estate office of Maury and
43 McLean on K Street between 15th and 16th Streets.

That he was familiar with the purchase and resale of premises 1514 K Street by Maury and McLean, Ghiselli and Peyser. That they bought the property from Harry A. Kite and resold it to the Georgia Industrial Realty Company, which he understood was acting as agent for the Southern Railway Company. That he knew Mrs. McLemore by sight and that he frequently saw her in the office of Maury and McLean during the period of this transaction and that on many such occasions Maury and McLean were both in the office. That he never saw Mrs. McLemore talk to Maury. That the purchase and resale of this property was handled entirely by Maury and McLean as a personal transaction and not as a corporate matter.

That he transacted some financial business for McLean and that in March and April, 1928, McLean was heavily involved financially, and at that time he did not carry in his own name such accounts and assets as he had. That at the time of the settlement of the resale of the property McLean was at home, sick in bed, and did not attend the settlement. That after the settlement had been made McLean received a statement of account between Maury and McLean in which statement Maury had credited McLean's interest in the proceeds of the sale against McLean's personal indebtedness to Maury. That he was present when McLean received the statement from Maury and that McLean said to him: "Well, Paul, we don't get any money out of this deal".

Whereupon the defendant introduced in open court the following testimony:

44 **John F. Maury** testified that he was one of the defendants in this cause. That he was associated with the defendant, Otto B. McLean, for a few months during the first part of 1927 as president of Maury-McLean, Inc., a corporation organized under the laws of Delaware, during February 1927, which company was engaged in the general real estate and insurance business in Washington,

D. C. The principal stockholders of this company were Otto B. McLean, who held 40% of the stock, the witness, John F. Maury, who held 40%, Herbert McLean, who held 10%, and H. W. Dure, who held 10%. That prior to incorporation Maury had been associated individually with McLean in one or two real estate deals. On May 26, 1927, the witness, John F. Maury, resigned as president and delivered his stock to the Company. That in December, 1926, McLean secured a contract from Harry A. Kite, the then owner of 1514 K Street, N. W., to purchase this property for Ninety-Three Thousand Two Hundred and Five (\$93,205) Dollars. That Twenty Thousand (\$20,000) Dollars of the purchase money was to be paid in cash and the balance was to be secured by a first and second deed of trust on the property. McLean asked him (witness) if he would join McLean and Ghiselli in taking a one-third interest each in this deal, which was agreeable to him (witness). Witness gave McLean Eight Hundred Thirty-Three and $\frac{33}{100}$ (\$833.33) Dollars, or one-third of the necessary cash deposit required of Two Thousand Five Hundred (\$2,500) Dollars. That in February, 1927, Julius I. Peyser became associated with McLean, Ghiselli, and himself in the enterprise, which was agreeable to all parties. That the arrangement between them was that each of them were to put up Five Thousand (\$5,000) Dollars of the purchase money, for which each were to receive a one-fourth interest
45 in the property. That at this time Maury knew nothing about the Southern Railway being interested in the property. This arrangement was carried out and the property was resold over a year later, in March, 1928, to the Georgia Industrial Realty Company, agent for the Southern Railway Company, for One Hundred and Ten Thousand (\$110,000) Dollars gross, less commission and allowance. This entire transaction was handled as a personal transaction and not as a corporation. That just prior to the resale of the property he traded a one-third interest he held in 1516 K Street to Julius I. Peyser for the one-fourth interest of Peyser in 1514 K Street.

That on February 23, 1927, he and McLean borrowed Ten Thousand (\$10,000) Dollars from the Commercial Savings & Security Bank, for which they gave a note of Harvey L. Randall, payable to their order and endorsed by them, being the note theretofore offered in evidence,

being plaintiff's exhibit No. 11 of this statement of the evidence. The Ten Thousand (\$10,000) Dollars so borrowed was placed to the credit of Julius I. Peyser and that on February 25, 1927, Peyser sent his check for Ten Thousand (\$10,000) Dollars to the Columbia Title Company, 5th and E Streets, N. W., to be used as part of the purchase money necessary to close the purchase of 1514 K Street from Kite, which money represented the Five Thousand (\$5,000) Dollars required of Maury and the Five *Five* Thousand (\$5,000) Dollars required of McLean towards the purchase price under the arrangement with Peyser and Ghiselli. That McLean did not pay this note or anything on account but that the note was curtailed by Maury and renewed from time to time and finally paid in full by him.

That McLean, on March 5, 1928, assigned to him his
46 one-fourth interest in this transaction pertaining to 1514 K Street, N. W. Witness stated that by reason of this assignment he became the owner of a three-fourths interest, Ghiselli continuing to hold a one-fourth interest. That when Peyser received the check from the District Title Company in March, 1928, representing the proceeds from the resale of the property, Peyser endorsed the check which was for Thirty-Three Thousand Eighty Nine and 09/100 (\$33,089.09) Dollars, to Maury and he placed the check to his credit and paid Ghiselli Eight Thousand Four Hundred Seventy-Two and 27/100 (\$8,472.27) Dollars, which represented the Five Thousand Dollars (\$5000) Ghiselli had put into the deal plus one-fourth of the profits made thereon, and also one-fourth of the accrued rents amounting to Two Hundred (\$200.00) Dollars, and that he, Maury, retained the entire balance of the proceeds from the resale of the property, which cost him approximately Fifteen Thousand (\$15,000) Dollars, valuing the one-fourth interest which he acquired from Peyser by exchange for Five Thousand (\$5,000) Dollars.

That a short time prior to February 28, 1927, he had loaned McLean approximately Six Thousand (\$6,000) Dollars. That shortly thereafter McLean endorsed to him the check for Two Thousand Two Hundred (\$2,200) Dollars, payable to Maude S. McLemore (plaintiff's exhibit No. 2), as part payment of the Six Thousand (\$6,000) Dollar loan. That about this time, or a few days later, McLean paid about Six Hundred (\$600.00) Dollars in cash to witness and that he deposited the cash and the check in the District

National Bank to his credit and gave credit to McLean against the loan to the aggregate of the check and
47 the cash received. That there is still a samll balance due Maury on account of this loan.

That he knew Mrs. McLemore but that he did not know she was connected with this transaction in any manner. That the only parties he knew in the transaction were Peyser, Ghiselli, McLean and himself, and that each of these had a one-fourth interest in the property.

Harry S. Welch testified that in February, 1927, he was employed as a settlement clerk for the Columbia Title Company, 5th and E Streets, N. W., and that he made the settlement in connection with the purchase, by Harvey L. Randall, of 1514 K Street, N. W. from Harry A. Kite. That the settlement was made on February 28, 1927, and that Twenty Thousand Dollars (\$20,000) purchase money was required to make the settlement. That he credited to the purchase money, a check, dated February 26, 1927, of Julius I. Peyser, for Ten Thousand (\$10,000)) Dollars, payable to the Columbia Title Company. That he credited a check, dated February 28, 1927, of W. B. Hibbs & Company, payable to the order of Maude S. McLemore, in the sum of Seven Thousand Eight Hundred (\$7,800) Dollars, and endorsed by her, as a part of the purchase money, and that he credited a Two Thousand Five Hundred (\$2,500) Dollar deposit made under the contract of purchase, and held by Boss & Phelps, agents for the seller, Harry A. Kite, and that these three items made up the entire cash money required in the settlement made by him.

48

Plaintiff's Exhibits.

EXHIBIT No. 1.

W. B. Hibbs & Company.

Washington, D. C., Feb. 28, 1927.

Pay to the order of Maude S. McLemore \$7,800.00 seventy-eight hundred dollars.

To Riggs National Bank, Washington, D. C.

W. B. HIBBS & COMPANY,
By P. R. RODLER, *Atty.*

(Endorsements:) Pay to the order of the Columbia Title Insurance Company. Maude S. McLemore. Riggs National Bank.

EXHIBIT No. 2.

W. B. Hibbs & Company.

Washington, D. C., Feb. 28, 1927.

Pay to the order of Maude S. McLemore \$2,200.00 twenty-two hundred dollars.

To Riggs National Bank, Washington, D. C.

W. B. HIBBS & COMPANY,
By P. R. RODLER, *Atty.*

(Endorsements:) Maude S. McLemore. Pay to the order of Jno. F. Maury. O. B. McLean. John F. Maury. The District National Bank.

49

EXHIBIT No. 3.

Washington, D. C., February 28, 1927.

On demand [— days after date]* I promise to pay to the order of Maud S. McLemore exactly ten thousand dollars exactly Dollars, for value received with interest at the rate of Six per cent per annum, until paid. Payable at the District National Bank of Washington, D. C.

O. B. McLEAN,
Address: 1522 K St. N. W.

With an attorney's fee.

In case payment shall not be made at maturity —.

Due — —, —.

EXHIBIT No. 4.

Boss & Phelps.

\$2,500.00.

December 10, 1926.

Received of Harvey Randall a deposit of Two Thousand Five Hundred Dollars, to be applied as part payment in the purchase of lot 810, in [Block]* Square 199, with improvements thereon, known as 1514 K Street N. W., in the City of Washington, District of Columbia.

Price of property: Ninety-three Thousand Two Hundred and Five Dollars.

[* Stricken in copy.]

Terms of sale: The Purchaser agrees to pay \$20,000 cash, of which sum this deposit shall be a part; the purchaser agrees to take property subject to first trust of \$50,000, with interest at 6% per annum, payable semi-annually, and due in three years. Purchaser also agrees to give back a second deed of trust for \$23,205, payable \$2,500 every six months, with interest at 6% per — annum, payable semi-annually.

If Harry A. Kite desires to occupy said premises after date of settlement he will pay a monthly rental of \$400.00 per mo.

The purchaser is required to make full settlement in accordance with the terms of sale within 60 days from date of acceptance by owner, or as soon thereafter as report on title can be secured or the deposit to be forfeited.

BOSS & PHELPS,
By GUY BIRCKHEAD,

Agent.

HARVEY L. RANDALL,

Purchaser.

HARRY A. KITE,

Owner.

Date accepted: Dec. 11, 1926.

50

EXHIBIT No. 5.

Statement of Account.

Washington, D. C., February 25, 1927.

The Real Estate Title Insurance Company of the District of Columbia.

To Harvey L. Randall, Dr.

Settlement Case No. 30349.

In re Purchase Lot 810, Square 199.

Price of Property.....	93,205.00	
Certificate of Title.....	119.00	
Tax Certificate.....	1.00	
Recording Deeds.....	4.10	
“ Trusts.....	5.90	
Notary Fee.....	1.00	
Settlement Fee.....	47.00	
Fire Insurance.....	150.00	
Conveyancing.....	10.00	
Int. on \$30,000.00 fr. 2/26/27 to 3/1/27 5½%.....	13.70	
Check to Maury & McLean, Inc.....	199.50	
Taxes @ 771.52 pd. to 12/31/26.....		117.87
Deed of Trust—assumed.....		50,000.00
“ “ “ Deferred.....		23,205.00
Deposit.....		2,500.00
Check received.....		10,000.00
“ “ “.....		7,800.00
Int. on \$50,000.00 fr. 2/9/27, 6%.....		133.33
	93,756.20	93,756.20

EXHIBIT No. 6.

Security Savings and Commercial Bank.

No. 5958.

Washington, D. C., Feb. 24, 1927.

Pay to the order of Columbia Title Company, ten thousand dollars, \$10,000.00.

J. I. PEYSER.

51

EXHIBIT No. 7.

The District Title Insurance Company.

No. 30983.

\$33,089.09.

Washington, D. C., March 29, 1928.

Pay to the order of Julius I. Peyser, Trustee, exactly thirty-three thousand eighty-nine dollars 09 cents.

To the Federal-American National Bank, Washington, D. C.

By J. H. STADTLER,
Secretary-Treasurer.

A.

(Endorsements:) Pay to John F. Maury. Julius I. Peyser, Trustee. For Deposit only to the Credit of John F. Maury. Pay to the Order of the District National Bank.

EXHIBIT No. 8.

The District Title Insurance Company, Washington, D. C.

March 26, 1928.

Julius I. Peyser, Trustee, in Account with the District Title Insurance Company.

Case No. 169,567-B.

In the Matter of Sale of Lot "A", Square 199, Sold to Georgia Industrial Realty Co.

By Price of property.....	110,000.00
" Insurance \$25.00 3/1/30 @ \$150. 3 years.....	96.57
To Deposit.....	500.00
" First deed of trust.....	50,000.00
" Interest accrued from 2/9/28 @ 6%.....	391.65
" Second deed of trust.....	20,705.00
" Interest accrued from 2/9/28 @ 6%.....	162.15

52

To Taxes accrued from 1/1/28 @ \$1086.74 per year..	259.51
" Taxes paid 1/2 1928.....	575.97
" Allowance as agreed.....	1,000.00
" Commission.....	3,400.00
" Preparing Release.....	5.00
" Recording Release.....	1.10
" Notary fee Release.....	1.00
" Preparing Quit Claim.....	5.00
" Recording " ".....	1.10
To Balance.....	33,089.09
	110,095.57
	110,095.57

EXHIBIT No. 9.

Security Savings and Commercial Bank.

No. 5944.

Washington, D. C., Feb. 16, 1927.

Pay to the order of O. B. McLean \$5,000.00 five thousand dollars.

J. I. PEYSER.

(Endorsements:) O. B. McLean. District National Bank.

53

EXHIBIT No. 11.

Washington, D. C., Feb. 23, 1927.

Sixty days after date, for value received, the undersigned promises to pay to John F. Maury and O. B. McLean or order, at the District National Bank of Washington, the sum of Ten Thousand Dollars, with interest at the rate of 6 per centum per annum, said interest payable as the holder hereof may demand, having deposited herewith and pledged as collateral security for the payment of this and any other liability of the undersigned to the holder hereof, the following property, to wit: 2 D. T. Notes @ \$5,000 each, dated 2/9/27, due on or before 1 yr. Secured on Lot A, Sq. 199.

(Signed)

HARVEY L. RANDALL.

Thereupon counsel for the defendant stated that he had no other evidence to adduce and rested his case. Whereupon the case was argued on all the evidence and the Court then and there found for the defendant and ruled that he would dismiss the bill of complaint. The Court in dismissing the Bill of Complaint said:

"I do not think the statute of limitations has any weight in the decision in this case. I think it is a question of whether the plaintiff has made out her case of bringing this to the attention of the defendant so as to render him liable for fraud that was perpetrated by McLean. There is no question about it but what McLean defrauded the plaintiff in this case.

I gave the plaintiff very wide latitude in introducing evidence because I realized the situation with which she found herself, but I think her testimony falls short of binding the defendant here, and I will sign a decree in his favor.

There was no actual knowledge or notice or information brought home to the attention of the defendant Maury and I do not think the testimony is sufficient to show that there is implied notice or knowledge or information on his part. It is not necessary to review that.

This is an unfortunate case for the plaintiff. She has been very unjustly dealt with in this case. It is very un-

fortunate that the person who is responsible to her is not before the court and cannot be made liable for his wrong.

So I will sign a decree in favor of the defendant Maury."

54 Be it remembered that the foregoing comprises all the substance of all the testimony given and all the proceedings in the trial of the said cause and counsel then and there prayed the court to sign this statement of the evidence and at the request of counsel for the plaintiff the same is accordingly signed and sealed and made a part of the record in this cause now for then this 7th day of October, 1932.

DANIEL W. O'DONOGHUE,
Justice.

55 It is hereby stipulated and agreed by and between counsel for the respective parties that the foregoing is a statement of evidence in the above cause and that the same constitutes substantially the entire evidence offered at the trial of said case.

L. Q. C. LAMAR,

L. Q. C. LAMAR,

Woodward Bldg.;

AUBREY B. FENNELL,

AUBREY B. FENNELL,

Woodward Building,

Attorneys for Plaintiff.

RALPH P. BARNARD,

RALPH P. BARNARD,

Evans Building,

Attorney for Defendant Maury.

Endorsed on cover: District of Columbia Supreme Court. No. 5833. Maude S. McLemore, appellant, vs. John F. Maury. Court of Appeals, District of Columbia. Filed Oct. 31, 1932. Henry W. Hodges, Clerk.

FEB 27 1933

Henry W. Stodges

CLERK

IN THE
Court of Appeals, District of Columbia

No. 5833.

MAUDE S. McLEMORE, *Appellant*,

vs.

JOHN F. MAURY, *Appellee*.

BRIEF FOR APPELLANT.

L. Q. C. LAMAR,
AUBREY B. FENNELL,
Attorneys for Appellant.

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IN THE
Court of Appeals, District of Columbia

No. 5833.

MAUDE S. McLEMORE, *Appellant*,

vs.

JOHN F. MAURY, *Appellee*.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from the final decree of the Supreme Court of the District of Columbia, holding an Equity Court, entered on March 22, 1932, dismissing the appellant's bill of complaint.

This is a suit for discovery, accounting and money decree brought by the appellant against Otto B. McLean and John F. Maury, appellee, to recover appellant's share of the proceeds of the resale of premises No. 1514 K Street, N.W., Washington, D. C., appellant having jointly purchased said property with the

defendants below and paid \$10,000 of the purchase price under an agreement that she would receive a one-fourth interest in the property and in the profits of resale. McLean was not served with process as he could not be found.

The salient facts of the case are as follows: In the latter part of 1926, the defendants below, John F. Maury and Otto B. McLean were associated in the real estate business, having an office together on K Street between 15th and 16th Streets, N.W., Washington, D. C. The appellant, Mrs. Maude S. McLemore, describes the transaction out of which the cause of action arose as follows (Record page 21):

“Mr. McLean of the firm approached me about going into an investment in a building at 1514 K Street with the idea that it was a good investment for me and he represented that there were only four persons in it, Mr. Maury, himself, Mr. Ghisselli, and myself.”

This was in November, 1926, at first she took no action but McLean urged it very strongly, always with the idea that it would be very beneficial to her and that the investment was a good one as the purpose of acquiring this property was to resell it to the Southern Railway. McLean wanted her to put up \$10,000 of the purchase money necessary to buy the property for which she was to receive a one fourth interest in the property and in the profits. (Record page 21) After some investigation on her part she learned that the Southern Railway was considering favorably the acquisition of the property in question and in the latter part of February, 1927, took \$10,000 out of H. B. Hibbs & Company, which at the request of McLean

she had payable in two checks, one for \$2200 and the other for \$7800. After receiving the checks she was driven in an automobile from Hibbs & Company to the title company at 5th and E Streets, accompanied by the defendant, Otto B. McLean, Martin J. Quigley, Ralph Benton and Harvey L. Randall, the last three being employees of Maury and McLean. (R. 22 and 29) When they reached the title company she handed these checks to McLean and McLean handed them over to Mr. Benton and asked him to deposit them (R. 23). McLean and Benton then went into the title company. Since then she has never received any of the funds which she invested (R. 22).

The checks were offered in evidence, the one for \$7800 showed the following indorsement "Pay to the order of the Columbia Title Insurance Company. Maude S. McLemore. Riggs National Bank." The check for \$2200 showed the following indorsements: "Maude S. McLemore; Pay to the order of John F. Maury. O. B. McLean. The District National Bank." (R. 33 and 34 respectively).

The written contract of purchase of the property in question is dated December 10, 1926. (Exhibit No. 4. R. 34). It is in the form of a receipt for \$2500, the price being \$93,205 of which \$20,000 was to be paid in cash. The purchaser was required to make full settlement within sixty (60) days from the date of acceptance by the owner. (December 11, 1926.) It is signed by Harry A. Kite "owner" and Harvey L. Randall, "purchaser," the latter being conceded to have acted as a "straw man" in the transaction. The defendants Maury and McLean and Frank E. Ghiselli each paid \$833.33 making the \$2500 required as the cash deposit under the contract, the defendants having

first agreed with Ghiselli that each of the parties would put up one-third of the cash required to be paid for the property and each would receive a one-third interest in the property and in the proceeds of resale. (R. 27) Ghiselli later agreed to allow Julius I. Peyser to participate and to accept a one-fourth interest therein (R. 28). On February 16, 1927, Ghiselli gave his check for \$5000 payable to the order of McLean in payment of his share of the purchase money. (R. 28). On February 16, 1927, Julius I. Peyser gave his check for \$5000 payable to the order of Otto B. McLean for a one-fourth interest. Subsequently Maury & McLean needing funds to complete the purchase, Peyser secured a loan of Ten Thousand Dollars (\$10,000) from the Security Savings & Commercial Bank. This sum was placed to Peyser's account and he paid the money to the Columbia Title Company by check dated February 24, 1927. (R. 26.) The loan was evidenced by a promissory note of the said Harvey L. Randall payable to the order of the said Maury and McLean and endorsed by them. (R. 31.)

The only cash received by the Columbia Title Company in settlement of the purchase was the \$7800 check of the appellant Maude S. McLemore and the \$10,000 of Julius I. Peyser representing the proceeds of the loan. (R. 24 and 33.) Neither the \$5000 of Ghiselli or the \$5000 of Peyser paid for their respective one-fourth interests were received by the title company in settlement of the purchase. Final settlement was made February 28, 1927 (R. 33), and thereafter the said Randall by deed conveyed the property to Peyser, as trustee to secure "such persons as have contributed to the purchase of said property * * *" (R. 25).

Peyser as trustee continued to hold title to the property until it was sold March 26, 1928, to the Georgia Industrial Realty Company, an agent of the Southern Railway Company. (R. 25 and 36.) In March, 1928, Peyser traded his one-fourth interest in this property to John F. Maury for a one-third interest in another property 1516 K Street (R. 27). On March 5, 1928, by an informal written assignment McLean purported to assign his interest (if any) in the property to Maury (R. 27). The property was sold for the price of \$110,000. Settlement was made by The District Title Company and that company paid Julius I. Peyser by check dated March 29, 1928, payable to his order as trustee for the sum of \$33,089.09 representing the cash balance in the transaction and Peyser endorsed the check to Maury who deposited the same in a bank to his individual credit. (R. 27, 32, and Ex. No. 7,—p. 36) Maury paid Ghiselli by check for \$8,472.27 and kept the balance. (R. 32.) Maury stated that although he knew Mrs. McLemore he did not know that she was connected with this transaction (R. 33).

There is very little conflict of evidence in the case. The only material questions of fact in dispute is that of the relationship of Maury and McLean during the period of the transaction and whether or not Maury had knowledge or sufficient notice to put him on inquiry of McLean's transaction with the appellant. Both of these questions will be dealt with under the appropriate points of law and the evidence pertinent thereto will be reviewed in detail.

The sole question involved in this appeal is whether upon this state of facts the appellant is entitled to an accounting and money decree against the defendant, Maury, as sought by her bill of complaint.

The appellant relies upon the following errors heretofore assigned:

1. In dismissing said Second Amended Bill of Complaint.

2. In holding that under the evidence the plaintiff was not entitled to a money decree against the defendant, John F. Maury.

3. In holding that under the evidence the plaintiff was not entitled to have an accounting between the defendant, John F. Maury, and the plaintiff.

4. In holding that under the evidence there was no money due the plaintiff from the defendant, John F. Maury.

5. In finding that under the evidence that the defendant, John F. Maury, had no notice nor knowledge of the transaction of the defendant, Otto B. McLean, with the plaintiff referred to in said Bill of Complaint.

6. In failing to hold that the defendants, Otto B. McLean and John F. Maury, were co-partners at the time of the transaction referred to in said Second Amended Bill of Complaint.

7. In failing to hold that under the evidence the defendant, John F. Maury, was bound by the transaction and contract of the said Otto B. McLean with the plaintiff referred to in said Bill of Complaint.

8. In ruling, as a matter of law, that one adventurer is not bound by the acts of his co-adventurer, within the scope of said adventure, without the knowledge of the former.

9. In failing to hold that even though the defendant, John F. Maury, was not bound by the act of the defendant, Otto B. McLean, that the said Otto B. McLean had sold or assigned his interest in the property and in the enterprise to the plaintiff, and, therefore, that the plaintiff was entitled to McLean's interest in the proceeds of

the sale of the property referred to in said Bill of Complaint.

All of the assignments of error will be included under the points of law hereinafter referred to, reference being made to the particular assignment under each legal point.

The points of law relied upon are as follows:

I. That Under the Evidence the Relation of Maury and McLean Was That of Partners.

II. The Court Erred in Refusing to Hold That Under the Evidence the Defendant, John F. Maury, Was Bound by the Act of the Defendant, Otto B. McLean in his Dealings With the Appellant, Maude S. McLemore.

III. That Even Though the Relation of Maury and McLean Were Held to Have Been That of Coadventurers Maury is Still Bound by the Acts of McLean.

IV. That Under the Evidence Maury had Knowledge or Notice Sufficient to put him on Inquiry of McLean Acts and is Therefore Liable.

V. That Even Though John F. Maury was not Bound by the Acts of Otto B. McLean, Yet the Said Otto B. McLean as the Owner of an Undivided One-Fourth Interest in the Property and the Venture Sold his Interest to the Appellant and Thereafter had no Interest Therein to Assign to Said John F. Maury. Therefore the Appellant was Entitled to a One-Fourth Interest in the Proceeds of Said Sale as Against Maury Claiming Under an Invalid Assignment.

VI. Under the Facts Appellant is Entitled to an Accounting and Money Decree Against the Appellee, John F. Maury.

ARGUMENT.**I.****That Under the Evidence the Relation of Maury and McLean was That of Partners.**

This point covers the 6th assignment of error. The trial court expressly held that Maury and McLean were not partners. (Finding of Fact R. 16.) If therefore the above point of law be correct there would seem little difficulty in establishing the liability of Maury for the acts of his copartners.

The uncontradicted evidence shows that Maury and McLean were associated in the real estate business (R. 21-26-28). They not only had joint offices but they acted in concert. Neither was subordinate to the other and both actively participated in the conduct of the business. Maury admits that prior to this transaction they had been associated in one or two other "deals." (R. 31.) This association later took the form of a corporation under the name "Maury-McLean Inc.", each having 40 per cent of the stock or an equal division of the profits. What then was this association shortly before they incorporated? In *Woodward vs. Nelligan*, 19 (App.) D. C. 550, an unincorporated building association was held to be a partnership.

Mrs. McLemore testified they were partners (R. 21). Julius I. Peyser, testified that at that time they were partners in the real estate business (R. 26). Frank E. Ghiselli testified that at that time Maury and McLean were engaged in the real estate business in Washington (R. 27), D. C. Paul Price testified that he had spent a large part of his time in the real estate offices of Maury and McLean on K Street between 15th and 16th Streets. (R. 30.)

A partnership may exist without an express agreement to form a partnership. *Robinson vs. Parker*, 11 App. (D. C.) 132. In that case Mr. Justice Shepherd p. 140, said:

“Therefore, if the plaintiff, without a special or express agreement to form a partnership contributed a fund to be invested as occasion offered in notes, stocks and the like, and agreed to share the gains and losses thereof between them, they therefore became partners in view of the law, and the court properly instructed the jury to that effect as requested by the plaintiffs.”

“ * * * it would have been proper at the request of the plaintiffs, to explain to them that if they believed the plaintiffs had in the beginning, agreed to operate with the joint fund and share the profits and losses, they would be partners in contemplation of law, whether or not they so understood the effect of the agreement at the time; and, in that event the subsequent declarations of one or all that they were not partners could not have operated to alter or destroy that relation.”

Under the above opinion therefore the testimony of Maury at the trial that he was not a partner of McLean would not affect the relationship as partners, if such in fact existed as we contend.

Every element requisite for a partnership is present in the instance case. There is a joint contribution of capital, and equal division of the profits, and in the event of loss there would have been an equal sharing of losses. Each actively participated in the business. Neither was subordinate to the other. Each participated in selling interests in the “deal” for the purpose of financing it. They jointly borrowed Ten

Thousand Dollars from the bank and made themselves jointly liable on the promissory note.

Even though they were not held partners as between themselves under the circumstances they would still be partners as to third persons. *Smith vs. Lancaster*, 37 App. (D. C.) 25. In this case Mr. Justice Shepherd, p. 28, said:

“The conduct of the parties in advertising and using a partnership name was sufficient to make them partners by estoppel as to third persons dealing with them in the faith of such representations, yet, as between themselves something more was necessary.”

See also *Williams vs. Gillies*, 53 How. P. R. p. 429.

On 30 Cyc. 392, it is said:

“Any conduct on the part of a person reasonably calculated to lead others to suppose that he is a partner in a particular business amounts to a holding out on his part; for by such conduct he lends his credit to the concern.”

There is no doubt that Mrs. McLemore thought they were partners (R. 21). That appellant was fully justified in this belief appears from the testimony of the other witnesses who shared this belief as above set forth.

The trial court in determining this relationship apparently looked solely to the transaction in question and its legal effect and held that the relationship was not that of partners but joint adventurers (See Finding of Facts R. 16.) In this we think the Court erred and that all the facts and circumstances in connection with this relation should have been considered and when so considered we think it reasonably certain that the

transaction in question was but one of a number carried on pursuant to this general association of the defendants, Maury and McLean. Neither the joint offices, the use of the joint name nor the subsequent incorporation of Maury-McLean, Inc. were necessary to carry out this one transaction but did evidence an intent to carry on a continuous real estate business, together this transaction being but an incident to that association.

However, even though this were not true and the relation of the two defendants must be considered solely with respect to this transaction, it is still our view that this would not alter the liability of Maury, because (1) Under the law of this jurisdiction the defendants would then become special or limited partners, (2) or even though the relation be held to be that of joint adventurers Maury would become equally liable in this regard for the acts of his coadventurer, McLean.

LIMITED PARTNERSHIP.

Parties may become special partners though the business is confined to a single transaction.

Dingman vs. Henry, 51 App. D. C. 339, holding that three attorneys associated in a case were special partners. The court said, p. 340:

“We agree with the trial court that the relationship of the original plaintiffs amounted to a special partnership since they were engaged in a common enterprise for mutual benefit.” (Authorities cited)

In Campbell vs. N. W. Eckinson Co., 28 App. D. C. 483 an agreement was entered into between the owner

of real estate and a builder whereby the latter agreed to erect houses, borrow money and to use his credit in consideration of which the builder "is to become possessed of an undivided one-third interest in the property". It was held that this agreement created a partnership. Mr. Chief Justice Shepherd, p. 494, said:

"The legal effect of this contract was to make complainant partners with Campbell in the development of the land by building houses; they furnishing the land and Campbell undertaking the erection of the houses."

This case was taken to the Supreme Court (229 U. S. 561) and while reversed on other grounds, that court holding that the deed granting to the builder a one-third interest in the property was valid, agreed with this court that the contract created a partnership.

Mr. Justice Pitney, p. 580 said:

"We agree that the legal effect of this contract was to make the complainants in effect partners with Campbell in the development of the land by building houses, they furnishing the land and he undertaking the erection of the house."

Page 581, continuing:

"What it (the agreement—parenthesis ours) meant was that he should have directly or indirectly, one-third interest in the proceeds of the property. In short, he was to be a 'partner' in the enterprise."

See also *Re: Warren v. Ware* (2 Daveis, U. S. Dist. Ct. 322.

It is therefore respectfully submitted that the court erred in holding that Maury and McLean were not partners.

II.

The Court Erred in Refusing to Hold That Under the Evidence the Defendant, John F. Maury, was Bound by the Transaction and Contract of Otto B. McLean With the Plaintiff.

The above is in substance the 7th assignment of error. If the relationship of Maury and McLean was that of partners as urged in the first proposition then we have the anomalous situation of one partner selling a one-fourth interest in real estate acquired by the partnership and upon resale at a substantial profit the other partner claiming the entire proceeds as his own. And to this we may add that Mrs. McLemore paid one-half of the cash necessary to be paid for the property. It is true that only \$7800 was received by the title company in the settlement (being equivalent to a direct payment to the seller) but this was no fault of appellant since she delivered both checks to McLean at the title company in the belief that they were being deposited there. However, the check for \$2200 was delivered and endorsed to Maury who deposited it to his personal account. Therefore the appellee, Maury, has received directly or indirectly all of the money obtained from appellant.

At the time Mrs. McLemore paid the money, the defendants had been in default in making the cash payment required to settle for a period of seventeen (17) days. (R. 33 and 35.) Demand had frequently been made upon them by the seller and they had been informed that it was necessary to close the transaction (R. 28 and 29). The transaction with Mrs. McLemore was done hurriedly because the money had to be in the title company by noon (R. 22). It was therefore

Mrs. McLemore's money that enabled the defendants to close the deal resulting in Maury's not only receiving his one-fourth profits but the profits of McLean as well, although neither Maury or McLean actually paid but \$833.33 each of their own money into the deal. If the fraud was entirely that of McLean's his copartner Maury has received the entire benefits therefrom. Maury's defense to this is that he did not know appellant in the transaction. Although this is denied (See Fourth Point of Law) we do not believe such defense can prevail for the following reasons:

1. The acts of McLean (in his dealings with plaintiff) were within the scope and object of the partnership and therefore his copartner is equally bound by the acts of McLean.

2. That Maury is jointly liable for the fraud of McLean.

3. That inasmuch as the plaintiff's money formed part of the purchase price the property is impressed with a trust to the extent of her interest and the proceeds from the sale of the property are likewise impressed with the trust.

1.

McLean's Acts Within the Scope of Partnership.

There can of course be no doubt as to the principle that all of the partners are liable for the acts of each within the scope of the partnership.

Woodward vs. Nelligan, 19 App. D. C. 550
 Flannery vs. Granite Co., 3 App. D. C. 395
 2nd National Bank vs. Yankou, 55 App. D. C.
 252.

The obtaining of money to finance the purchase of this property was not only within the scope of the business but necessary for its successful termination. The selling of these interests for contributions to the purchase price had not only been done by McLean with the consent of Maury but by the active participation of Maury (see Peyser's testimony, R. 26; Ghiselli's testimony, R. 28) McLean had the same authority to sell Mrs. McLemore an interest as he had to sell Peyser or Ghiselli.

In 30 Cyc. page 503 it is said:

“A partnership is liable for money borrowed by one of its members, on the credit of the firm within the scope of its authority and according to the usual course of its business, nor will the lender's rights be affected by the borrowing partners misapplication of the money, if he has acted in good faith.”

2.

Fraud.

Maury is equally liable for any fraud perpetrated by McLean.

National Savings & Trust Co. vs. Sands, 44 App. D. C. 20, in a suit for an accounting, the members of a copartnership firm of real estate agents were held jointly and severally liable to the principal for fraud where the agency was with the firm although some of the fraudulent transactions were conducted personally by one of the members of the firm.

See also Lane vs. Fenn, 120 N. Y. S. 237, 65 Misc. 836.

Trust.

This involves not so much the question of agency but the rights and equities of Mrs. McLemore in the property and in the proceeds of sale thereof and will therefore be treated under the 5th point of law.

We do not think it will be seriously controverted that if a partnership existed that Maury would be liable in this action. The Court answered this question by deciding that the relation was that of coadventurers and not partners and such being the case that the doctrine of agency did not apply. The Court stating in its findings of fact as follows:

“The Court finds that the defendants John F. Maury and Otto B. McLean were coadventurers but not partners in this transaction * * *” (R. 16)

“The Court is of the opinion that the defendant John F. Maury is not bound by the acts of his coadventurer Otto B. McLean without knowledge on the part of the defendant, John F. Maury.”

This brings us to the next proposition.

It is therefore submitted that the court erred in holding that the relation of partnership did not exist and that such decision was vital to his ultimate decision dismissing the bill.

III.

That Even Though the Relation of Maury and McLean Were Held to Have Been That of Coadventurers Maury is Still Bound by the Acts of McLean.

This covers the 8th assignment of error.

We do not think the relation of the two defendants

was that coadventurers. After the plaintiff invested her money in the enterprise we think her relation with the copartnership (of Maury and McLean) was that of joint adventurer. However, assuming the relation of Maury and McLean was that of coadventurers, it then becomes necessary to examine more closely that relation. Certainly according to the weight of authority, that relation is something more than mere cotenancy in the property. The courts frequently use the term "joint adventurers" as interchangeably with a special or limited partnership.

Hammel vs. Feigh, 143 Minn. 115, 173 N. W. 570.

Stoop vs. U. S. (Or), 250 Pac. 760.

Barton vs. Wamsly, 194 Iowa 591, 190 N. W. 18.

In 33 C. J. 841, it is said—

"A joint adventure has been aptly defined as a 'special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation'."

And a joint adventure is generally governed by the same rules as a partnership.

In 33 C. J. 841, it is said:

"A joint adventure is a legal concept of comparative recent origin. It is purely a creature of our American Courts. At common law an enterprise of limited character, such as is now called a joint adventure, was regarded at law as merely an informal kind of partnership, and the courts made no attempt to distinguish one from the other. Such is still the case in England and in Canada, but in the United States the courts about the

middle of the last century, began to find it convenient to draw distinctions between them, and hence there is gradually building up a body of American law applicable to the relation of joint adventures which may or may not apply to the relation of partners. So far the divergence between the two relations is very slight; so slight in fact that it is generally asserted that they are governed by the same rules of law."

Id. page 842:

"as respects the character of the business undertaken, the principal difference is that, while a copartnership is ordinarily formed for the transaction of general business of a particular kind, a joint adventure is usually, but not necessarily, limited to a single transaction, although the business of conducting it to a successful termination may continue for a number of years."

See also case note in 48 A. L. Rep. page 1064 and 63 A. L. R. 915.

In Hammel vs. Feigh, 143 Minn. 115, 173 N. W. 570, it was held that an action of partnership accounting would lie between the adventurers. The Court page 444 said:

"Real estate belonging to joint adventurers, whether title is in one or more parties, is impressed with a trust for the benefit of all. The terms and intent of the parties must control. While a joint adventurer is not identical with a partnership, it is so similar in its nature that the rights of the parties thereto are governed by practically the same rules."

And there seems no substantial difference between the authority of one adventurer to bind his coadventurer and that of one partner to bind the other.

In 33 C. J. 871, it is said:

“As to third persons who deal with a joint adventurer in good faith and without knowledge of any limitation upon his authority, the law presumes him to have been given power to bind his associates by such contracts as are reasonably necessary to carry on the business in which the joint adventurers are engaged.”

It was held in *Bond vs. O'Donnell, et al.*, 205 Iowa, 902, 218 N. W. 898, that where coadventurers buy land for speculation all are held liable for a deficiency purchase money mortgage though one took title and executed the mortgage in his own name.

The Court page 902 of (N. W.) said:

“Consequently in the case at bar a number of the group, whose ‘joint adventure’ was to buy land for speculation, had authority to bind each member of the organization for the necessary purchase price of such real estate under the doctrine of agency, wherein he, as representative of the others, was acting within the contemplated sphere of the endeavor.”

In *Nelson vs. Lindsay*, 179 Iowa, 863, 162 N. W. 3. It was held that one coadventurer is chargeable with notice of the acts of the other coadventurer. In that case one adventurer attempted to attach an automobile that had been sold by the other coadventurer. In deciding between the equities of the attacking adventurer and the purchaser in favor of the latter, the Court said p. 5 (N. W.):

“Parties may enter into a joint enterprise whereby they assume mutual obligations to each other and agree to a basis of sharing profits. Such an arrangement may fall short of being a partnership, though it has some of the elements of partnership. It is often denominated in the books as a joint adventure. The relation of such an enterprise is one of trust and confidence. The interest of each is affected by the conduct of the other. With reference to such enterprise the parties are under mutual obligations of good faith performance and frank disclosure of all material facts. The act of each party as to third parties is for the benefits of all the joint adventurers. In that respect the relation between themselves are similar to those of partners.”

In *Lane vs. Fenn*, 120 N. Y. S. 237, 65 Misc. Rep. 336, affirmed 130 N. Y. S. 995, 146 App. Div. 205. It was held that adventurers were liable for fraud or misrepresentations of their coadventurers, though the former were innocent of any personal wrongdoing.

To the same effect is *Hambleton vs. Rhind*, 84 Md. 456, 33 C. J. 873.

In *Martin vs. Morrison*, 260 S. W. 893 (Tex. Civ. App.), it was held that one joint adventurer had authority to sell the interest of the joint adventure in an oil lease though without the knowledge of the other adventurer, as this was within the scope of the enterprise.

If one adventurer has authority to sell the property without the knowledge of the other we submit that he has an equal authority to sell an undivided one-fourth interest therein as in the case at bar.

The following cases likewise support this doctrine:

Boiler & Weldine Co. vs. Minn. Lumber Co., 103 Okla. 226, 229, Pac. 1045
Mission Ridge Land Co. vs. Nixon, 48 S. W. 405

Bloom vs. McGinnity Co., 143 P. 825, 26 Colo.
256

Braddock vs. Hinchman, 79 A. 419, 78 N. J. Eq.
270

Anderson vs. Weber, 148 N. Y. S. 133, 162 App.
Div. 725

Williams vs. Gillies, 53 How. P. R. 429.

It is therefore submitted that the Trial Courts ruling as a matter of law that one adventurer could not bind his coadventurer was unsound and as its ultimate decision dismissing the bill of complaint was founded upon this erroneous principle it follows that the decree dismissing said bill is likewise erroneous and should be reversed.

IV.

That Under the Evidence Maury had Knowledge or Notice Sufficient to Put Him on Inquiry and is Therefore Liable.

Although under the authorities cited under the preceding propositions Maury is liable in this transaction without knowledge or notice, it is submitted that in view of the facts as shown in this case Maury had notice sufficient to put him on inquiry if not actual knowledge.

It is true that Maury testified that although he knew Mrs. McLemore he did not know that she was connected with this transaction. (R. 33.) The defendant did not offer the testimony of McLean who could have corroborated the testimony of Maury in this respect. Certainly it was not the duty of appellant to call a co-defendant to prove her case. It is true that at the time of the trial McLean was not in this jurisdiction but

the record is silent as to what if any effort was made to procure his testimony.

These circumstances call for the application of the rule that the failure of a party to produce evidence without proper explanation creates a presumption that such evidence is unfavorable to such party.

Clifton vs. Howard, 4 How. 242, 11 L. ed 957;
Kirby vs. Tallmadge, 160 U. S. 379, 40 L. ed 463;
Fitzsimmons vs. Ogden, 7 Cranch 2, 3 L. ed 254;
Runkle vs. Burnham, 153 U. S. 216, 38 L. ed 694;
Crosby vs. Buchanan, 23 Wall. 420, 23 L. ed 137.

The rule is particularly applicable in this case because while this defense is a comparatively simple one to invoke it is extremely difficult to directly controvert, since the truth is entirely in the possession of the defendants Maury and McLean.

There are however circumstances in the case which we believe are sufficient to have at least put Maury upon inquiry.

Maury knew Mrs. McLemore (R. 33). Paul Price testified "that he knew Mrs. McLemore by sight and had frequently seen her in the office of Maury and McLean *during the period of this transaction* and on many occasions both Maury and McLean were in the office." (R. 30.) See also Miss Ruppert's test. (R. 280.)

Maury must certainly have known that they needed additional money to complete the transaction. The time for paying the money under the contract expired February 10, 1927, and was not actually paid in until 17 days later. Guy Birkhead, agent for Harry Kite the former owner testified that "on or about February 10, 1927, when the sixty day period specified in the

contract had expired, the owner Mr. Harry A. Kite, repeatedly asked him why the settlement was not closed, and that from February 10, to February 28, 1927, he frequently communicated with the office of Maury and McLean, inquired why the settlement was not made and informed that office that Kite said it was necessary to close the transactions". (R. 28 and 29) It must be borne in mind that during this period Maury was actively participating in the enterprise. Ghisselli testified that "he discussed this matter frequently with both Maury and McLean". (R. 28) Peyser testified that after this matter was brought to his attention by O'Brien an employee of Maury and McLean "his transactions were entirely with Mr. Maury except once in a while he would discuss the matter with Mr. McLean". "That subsequent to February 18, 1927, Maury and McLean needed funds to complete the purchase and Peyser secured a loan of Ten Thousand Dollars from the Security Savings and Commercial Bank". (R. 21)

Maury as a man of business experience must certainly have known that the contract was in default in that the money had not been paid in on time. It would seem incredible that the notice given by Birkhead that the seller demanded settlement in accordance with the terms of the contract was not brought home to Maury, who at that time was active with McLean in soliciting a loan from Peyser to close the deal. Peyser paid the money to the Title Company by check dated February 24. Still the settlement was not made until February 28. If the seller was pressing Maury and McLean for immediate settlement and Maury was equally interested in making settlement and had borrowed \$10,000 for that purpose, is it not reasonable to suppose that

Maury made some inquiry as to why settlement was not made before February 28, 1927, the date that the Title Company received the money from Mrs. McLemore. While settlement was made February 28, 1932, the settlement sheet is dated February 25, 1927, showing the parties intended to make settlement on the earlier date.

Why was it necessary for Maury and McLean to borrow \$10,000 when only \$7800 was necessary to close the deal (settlement sheet R. 35) that is assuming that the \$5000 each received from Peyser and Ghiselli was available? The settlement sheet showed a payment of \$7800 (Mrs. McLemore's check). McLean had received \$10,000 from Peyser and Ghiselli, so that the settlement sheet on its face showed that McLean had a balance of \$2200 of Ghiselli and Peyser's money that he had not put into the deal. Under these circumstances should not Maury have demanded an accounting or at least asked of McLean some explanation. Maury-McLean Inc. received an adjustment check from the Title Company of \$199.50. Maury must have received this check as president of the company and he would certainly have gone over the settlement sheet or in any event is chargeable with notice therewith. *U. S. Trust Company vs. David*, 36 App. D. C. 549.

The payment by Mrs. McLemore was done hurriedly because the money had to be in the Title Company by noon. (R. 22, Mrs. McLemore test.) Besides McLean, three employees of Maury-McLean knew all about the transaction having accompanied her in the automobile from Hibbs Company to the Title Company when McLean handed the checks to Mr. Benton. (R. 23) Martin J. Quigley, the settlement clerk of Maury-Mc-

Lean, one of the three employees testified that he knew all about the transaction. (R. 29 and 30)

There was therefore no secrecy connected with the transaction. It was common knowledge of the employees and it is amazing that Maury was in entire ignorance of the matter. Maury received for his own personal use the \$2200 check of Mrs. McLemore and credited this against an indebtedness of McLean to him. We think under the circumstances it would have been well nigh impossible for Maury not to have known something of the transaction with Mrs. McLemore. He certainly had sufficient facts to have put him on inquiry, the record of this payment was available at the Title Company and it was his agent in the transaction. He had ample means of learning of the true situation. We do not believe the law would permit him to shut his eyes to information so obvious and thereby escape liability.

In *Manogu vs. Bryant*, 15 App. D. C. 245, it was held that knowledge of facts or circumstances reasonably sufficient to put a person of ordinary prudence upon inquiry which if pursued with proper diligence would lead to the discovery of the actual condition of the title, is equivalent to knowledge direct and certain.

We think the same rule applies in this case.

In *Morimura vs. Samaha*, 25 App. D. C. 189, the Court page 197, said:

“A purchaser from a fraudulent vendor, as in other cases of purchasers of defective titles, is put upon inquiry, where his knowledge of facts and circumstances reasonably sufficient to excite the suspicions of a man of ordinary prudence and business capacity as to the purpose and intent of his vendor, which if inquired into with ordinary dili-

gence, would lead to the discovery of that purpose and intent. In such a case his situation is not different in law from that of one who is shown to have had direct and certain knowledge.”

In *United States Trust Co. vs. David*, 36 App. D. C. 549, it was held that an order of the appointment of a receiver furnished a bank was notice of the bill of complaint upon which the order was made.

Held also that a paper which expressly refers to another paper within the power of the party to inspect gives notice of the contents of the other paper.

Mr. Justice Robb, page 557, said:

“We think these facts clearly bring the case within the rule that “whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have lead. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. *Wood vs. Carpenter*, 101 U. S. 135, 25 L. ed 807.”

It is further submitted that the notice of the employees of Maury and McLean Company who accompanied Mrs. McLemore on her trip to the title company and who had knowledge of the transaction and also the knowledge of the title company together with the record evidence in its possession, which company was acting for Maury in this transaction, constituted knowledge to Maury upon the principle that notice to the agent is notice to the principal.

Johnson vs. Tribby, 27 App. D. C. 281; *Willey vs. Stormont*, 38 App. D. C. 399.

We therefore respectfully submit that Maury had knowledge or notice of McLean’s acts and is therefore liable for the acts of McLean.

V.

That Even Though John F. Maury was not Bound by the Acts of Otto B. McLean, Yet the said Otto B. McLean as the Owner of an Undivided One-Fourth Interest in the Property and the Venture Sold his Interest to the Appellant and Thereafter had no Interest Therein to Assign to said John F. Maury. Therefore the Appellant was Entitled to a One-Fourth Interest in the Proceeds of Said Sale as Against Maury Claiming Under an Invalid Assignment.

The above point of law covers the 9th assignment of error.

Regardless of whether or not Maury in this transaction was bound by the acts of McLean or had knowledge or notice thereof, McLean as the owner of an undivided one-fourth interest in the property and venture had the right to sell his own interest therein. The plaintiff has paid for this interest and her money went directly to the seller of the property. She therefore became the equitable owner of an undivided one-fourth interest in the property and hence became entitled to an undivided one-fourth interest in the proceeds of the sale. McLean could not thereafter (over a year after) deprive her of this interest by an informal assignment to Maury made a few days prior to final settlement on resale of the property. McLean having parted with his interest had nothing to assign to Maury.

In *Selwyn & Co. vs. Waller*, 212 N. Y. 507, a case involving joint adventurers in the production of a play, one of the joint adventurers had assigned a part of his interest prior to his assignment to the plaintiff. It

was held that the assignee (plaintiff) took subject the equities as well of third parties as of the original owner.

The Court page 513, said:

“The respondent does not appear to question appellant’s contention that the plaintiff acquired only what its assignor had to sell. No element of estoppel being involved, it seems plain that the plaintiff took subject to the prior equities as well of third parties as of the original owners. At any rate, that is the settled law of this state (authorities cited)”.

Contracts of this kind do not constitute an interest in land and therefore the statute of frauds would have no application. *Martin vs. Morrison*, 260 S. W. 893. *Bond vs. Taylor*, 69 S. E. 1000; 68 W. Va. 317. *Williams vs. Gillies*, 53 How. Pr. 429.

The contract with appellant was therefore not required to have been recorded and is binding though Maury had no notice. Therefore if the other disputed questions were resolved in favor of Maury, the appellant should prevail under the point of law at hand under the maxim of “where the equities are equal the first in order of time shall prevail.”

On the other hand all that has been heretofore said upon the fact of notice is equally applicable here. We may also refer to the circumstances of the assignment of McLean’s interest to Maury. Paul Price, an employee of McLean (R. 30) testified that

“in March and April, 1928, McLean was heavily involved financially, and at that time did not carry in his own name such accounts and assets as he had. That at the time of the settlement of the

resale of the property McLean was at home, sick in bed, and did not attend the settlement.”

Again it must not be overlooked that Maury contributed in bringing about the situation by his association with McLean. Mrs. McLemore would not have put her money in the enterprise except that she knew Maury. (R. 23.) He certainly had apparent authority to sell this interest as the selling of interests in the property had received the sanction of Maury. This is similar to the authorities which hold that where one clothes another with apparent authority to act and that other commits a fraud upon a third person as between the two innocent persons the first must suffer. *Dias vs. Chickering*, 64 Md. 348, where the Court (page 355) said:

“The facts in this case bring it within the principle that “when one of two innocent parties must suffer by the fraud of a third, the loss shall fall upon him who has enabled such third person to do the wrong.”

It is therefore respectfully submitted that the court erred in failing to hold that the plaintiff acquired a one-fourth interest in the property under any view of the case.

VI.

Under the Facts the Appellant is Entitled to an Accounting and Money Decree Against the Appellee, John F. Maury.

This point of law involves the first, second, third and fourth assignments of error. If the other proposi-

tions are correct this proposition would seem to follow as a matter of course.

If the relation of the parties is that of partners then a bill for an accounting and money decree is the proper remedy.

In *Fowlkes vs. Stone*, 29 App. D. C. 379, where land was bought on joint account for partnership purposes and title was taken in the name of one partner, it was held that the partner taking title holds it subject to a trust in favor of his copartner and that a bill for an accounting would lie.

The Court said (383):

“The court was clearly right in declaring the legal title vested in Stone as subject to a trust in favor of the complainant. The evidence oral and written shows the purchase of the land was made on joint account.”

See also *Grafton vs. Paine*, 7 App. (D. C.) 255.
Melton vs. Kingsley, 7 App. (D. C.) 531.

The same rule is applicable if the relation of the parties is that of joint adventurers.

In 33 C. J. page 854, it is said:

“A joint adventurer who pays his share of the purchase price of real estate bought for the purpose of the enterprise acquires thereby a vested equitable interest in the land itself as well as in the profits from the resale thereof.”

To the same effect are *Johnson vs. Farmers and Merchants Bank*, 152 Minn. 442, 189 N. W. 583. In re *McConnell*, 197 Fed. 438. *Burkhardt vs. Walsh*, 49 App. Div. 634, 64 N. Y. S. 779. *Barton vs. Wamsley*, 194 Iowa 591, 190 N. W. 18. *Selwyn & Co. vs. Waller*,

supra. Ross vs. Stevens, 45 N. J. Eq. 231. Gamble vs. Loffler, 28 S. D. 239, 133 N. W. 288.

Appellant having jointly purchased the property with the appellee, the appellee should not be permitted to take to himself the proceeds of sale, and therefore a bill for an accounting should lie.

It is therefore respectfully urged that the decree dismissing the bill of complainant was erroneous and should be reversed.

Respectfully submitted,

L. Q. C. LAMAR,
AUBREY B. FENNELL,
Attorneys for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

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In the Court of Appeals
OF THE DISTRICT OF COLUMBIA.

No. 5833.

MAUDE S. McLEMORE, APPELLANT,

vs.

JOHN F. MAURY, APPELLEE.

BRIEF FOR APPELLEE.

RALPH P. BARNARD,
WILLIAM E. RICHARDSON,
Attorneys for Appellee.

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APPELLEE'S STATEMENT OF FACTS.

The appellant, on pages 1 to 5, inclusive, of her brief, states the facts which in appellant's view of the case are material, but we feel that this statement does not include certain important phases of the transaction which were controlling at the trial of the case. Without attempting to repeat the testimony or issues in the case, we will summarize these additional facts briefly as follows:

The second amended bill was filed upon the theory that the appellee and one McLean were partners in the real estate business, including the buying and selling of real estate for profit and gain; that they purchased the property 1514 K Street Northwest, pursuant to their partnership arrangements; that being unable or unwilling to pay the balance of \$10,000 of the \$20,000 purchase price, they approached the plaintiff, through

the defendant McLean, "acting as the duly authorized agent of said partnership and joint adventurers, and asked the plaintiff to invest the sum of \$10,000 in said enterprise, and promised and agreed to pay the plaintiff said sum and one-third of the profits which would be realized from said venture" (Rec. 3). Plaintiff therefore avers that she "did thereby become and was a co-partner and joint adventurer with said defendants in said enterprise and entitled to receive her proportionate share of the profits therefrom."

On page 2 of appellant's brief her testimony is quoted, which discloses the real facts of the transaction differing essentially from the bill of complaint. In substance she says McLean invited her to join him, the appellee Maury, and one Ghiselli in a speculative purchase of the building, representing that it was a joint adventure in which four people would be interested and that she would have a one-fourth interest with the other three above named.

The record shows that this occurred in November, 1926. She did nothing in the matter from that time until the last day of February, 1927. She had known Mr. Maury for many years and was frequently in his office, but never mentioned this matter to him.

Meanwhile, some ten days before she had any further negotiations with Mr. McLean, the other three parties to the joint adventure, the appellee, Ghiselli and McLean, had conferred with and invited Major Julius I. Peyser to join them in the purchase and he had agreed. The details of taking title had been arranged. \$20,000 cash, less the \$2,500 deposit had to be paid, and Major Peyser and Mr. Ghiselli had given their checks for \$5,000 each to *McLean*. Major Peyser had discounted a \$10,000 note of McLean and Maury at his bank,

which credited his account with the \$10,000 and completed the \$20,000 cash required. The matter being then ready to close at the Columbia Title Company, the vendor's deed was deposited, Major Peyser turned over to the Title Company this \$10,000, representing the Maury and McLean shares of \$5,000 each, and it remained only for McLean to turn over to the Title Company the remaining amount of approximately \$7,500, represented by the Ghiselli and Peyser shares less the deposit, for which they had given him personally their checks on February 16th

On February 24, 1927, McLean accordingly gave his (McLean's) personal check to the Title Company for \$7,734.27. This check was returned by the bank dishonored (R. 24, 25). It does not appear that the Title Company ever communicated this fact to either Peyser, Maury or Ghiselli or that they knew of it. It therefore became necessary for McLean to make good the amount of his check because the deal was being suspended at the Title Company, the time for closing had expired, and the seller was most pressing to have the deal closed (R. 28, 29).

On February 28th, McLean went to the appellant, had her draw \$10,000 from Hibbs and Company in two checks, one for \$7,800 and one for \$2,200, and went with her from the office of Hibbs and Company in McLean's automobile to the Columbia Title Company (Rec. 22). She did not go in the Title Company's office, but states that she waited in the car while McLean, to whom she had given the checks, delivered them to the company. Thereupon McLean gave her his demand note for \$10,000, which had never been paid and she did not receive any contract or other paper showing her interest in the transaction.

The \$7,800 check was on that day delivered by McLean to the Title Company and entered into the settlement as a substitute for his dishonored check, and the deal was thereupon closed. The \$2,200 check McLean endorsed to Maury on account of another transaction on which he was indebted to Maury for \$6,000, without any explanation of the circumstances under which he had received it.

The property was thereupon vested in Peyser as trustee, and he issued four declarations of trust, one to his wife, one to Ghiselli, one to McLean, and one to Maury. The title was so carried and the property managed by Peyser for about fourteen months, when it was sold to the holding company for the Southern Railway at a profit of \$13,000.

Maury's connection with Maury-McLean, Inc., was terminated by him in May, 1927.

Meanwhile, Maury was compelled to pay the entire \$10,000 note which Major Peyser had discounted for Maury and McLean, including McLean's share of the liability. He also gave credit to McLean for certain indebtedness owing on other accounts, and purchased McLean's one-fourth interest in 1514 K St., which was duly assigned to him. He also traded other property for the Peyser one-fourth interest, which was also assigned to him, so that when the transaction of sale was made by Peyser as trustee, the proceeds of sale, amounting to \$33,000, were distributed one-fourth to Ghiselli and three-fourths to Maury.

Although Mrs. McLemore testified that she was in Maury's office many times, she never had any word from Mr. Maury that he was in this transaction, she never asked Mr. Maury about the matter, and she never made any demand upon Maury for the payment of any money

except through her attorney just before filing suit. The property was purchased in February, 1927, sold by Peyser as trustee in March, 1928, and the suit was filed more than two years thereafter.

The record shows that in February, 1927, Maury and McLean were engaged in business as officers and stockholders of Maury-McLean, Inc., a corporation conducting a real estate office under that name, in which the stock was held 40% by McLean, 40% by Maury, 10% by Herbert McLean, and 10% by H. W. Dure. The witnesses produced by the plaintiff testified that this was a corporation (Rupert, p. 28; O'Brien, p. 29; Quigley, p. 29; and Price, p. 30). Price testified that "the purchase and resale of this property was handled by Maury and McLean as a personal transaction and not as a corporate matter".

The court upon these facts (R. 16) found that there was no partnership between these men; that this transaction was one of joint adventure and not one in which Maury and McLean were partners, that the plaintiff had failed to prove knowledge on the part of Maury of the transaction between McLean and the plaintiff or of the fact that the plaintiff's money formed a part of the purchase money for the property, and that the defendant Maury was not bound by the acts of McLean transacted without his knowledge.

ARGUMENT.

I.

The Relation of Maury and McLean Was Not That of Partners.

The obvious purpose of the appellant is to present this case on a double aspect of liability, first, that this was a general partnership transaction of Maury and McLean; and second, that by entering upon a joint adventure with respect to a particular property, a partnership was created in the individual transaction.

Findings of fact will not be reviewed by this Court unless they are "clearly and manifestly wrong". Rhoderick, et al., vs. Swartzell, decided May 29, 1933.

The claim of appellant (p. 8) is based on a general partnership alleged to exist between the two men broad enough to cover this transaction. The evidence shows that they were never partners in the real estate business, and no evidence whatever supports the contention of the plaintiff in paragraph 4 of the amended bill of complaint (Rec. 2) that they were partners engaged in the real estate business, which business included the buying and selling of real estate on their own behalf. Plaintiff herself testified (R. p. 21) that "Maury and McLean were engaged in the real estate business as partners in 1927". She then states that McLean first approached her in November, 1926, but at that time she took no action. It will be noted that she does not state that they were partners at that time.

Major Peyser testified (R. 26) that the matter was first brought to his attention by one O'Brien, who was employed by "Maury and McLean" or "Maury-McLean Company". This was in February, 1927.

He also states "that Maury and McLean at that time were partners in the real estate business".

Mr. Ghiselli (R. 27) testified that "John F. Maury and McLean were engaged in the real estate business in Washington, D. C." He does not state what their relationship, if any, was.

It will be noted that both Peyser and Ghiselli handled this transaction as an individual matter, and made their checks for their respective one-fourth interest payable to McLean individually.

Miss Ruppert (R. 28), witness for the plaintiff, testified that she was employed by the McLean Company first in the fall of 1926 and afterwards by Maury and McLean. Maury and McLean were incorporated, and she kept the minute book.

O'Brien, also a witness for plaintiff (R. 29) testified that in 1926 he was an employee of McLean; that in the latter part of that year or the first part of 1927, Maury became associated in the real estate business with McLean, and they incorporated under the name of "Maury and McLean, Inc.", and witness was made an officer of that company.

Quigley, also a witness for the plaintiff (R. 29) testified that in February, 1927, he was an officer of Maury and McLean, Inc.

Price (R. 30) testified for plaintiff that he was employed by McLean in 1926, 1927 and 1928; "that the purchase and resale of this property was handled by Maury and McLean as a personal transaction and not as a corporate matter."

For the defendant, the appellee testified that during February, 1927, and until May 26, 1927, he was president of Maury-McLean, Inc., a corporation organized under

the laws of Delaware and engaged in the general real estate and insurance business in Washington; that prior to incorporation, he had been associated individually with McLean in one or two real estate deals.

The defendant's answer, which is under oath, denies the allegations of the fourth paragraph of the second amended bill and specifically states that no partnership ever existed between Maury and McLean (R. 5).

The case of *Latta vs. Kilbourn*, 150 U. S. 524, which arose in this jurisdiction, presented a somewhat similar question. The parties had been admittedly partners in the real estate business in Washington. The plaintiff sued the defendant for an accounting upon the theory that certain purchases of real estate made by the defendant partner, some individually and as a joint adventure with others, constituted partnership business and that the defendant partner was liable to the plaintiff partner for an accounting of the profits made in these transactions.

The court held that although it was claimed that in entering into the verbal contract of partnership it was agreed that neither partner should engage in individual purchases of real estate for speculation without notifying the other and giving him the privilege of joining and although it was admitted that in certain instances the partners had purchased on joint account, such purchases made by an individual partner could not be regarded as a partnership affair.

The court commented (pp. 541-542) upon the fact that the defendant's answer "positively and in direct terms denied the allegation of the bill that it was ever agreed that the firm should carry on the business of buying and selling real estate, and that at no time was

such transaction within the scope of the partnership business." It said:

"Under the well settled rules of equity pleading and practice, his answer must be overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances."

The court then states:

"The well known characteristics of 'real estate and note brokers,' indicating, as the words imply, those engaged in negotiating the sale and purchase of real property for the account of others, afford a presumptive limitation upon the scope of the business, such as the appellant asserted and testified to in this case. His sworn answer and testimony on this point has not been overcome by the vague and equivocal testimony of the appellees. The court below was in error in finding as a matter of fact that the partnership extended to the buying and selling of real estate for the account of the firm."

Whatever the allegation of the second amended bill as to the scope of the alleged partnership, there was no evidence offered to extend the alleged partnership to individual transactions of the alleged partners in the purchase and sale of real estate for their own account. We have cited this case of *Latta vs. Kilbourn*, *supra*, because that case conclusively established the fact in this jurisdiction that there can be no presumption arising from the fact of partnership in the real estate business if such a partnership had existed that such a transaction became a partnership affair. We submit therefore that the evidence is conclusive that at the time this transaction occurred, Maury and McLean were not partners but were transacting a real estate business as

officers and stockholders of a corporation then engaged in the general real estate business; that the transaction was an individual transaction in which the corporation was not concerned or interested, and the only characterization of partnership applicable to any phase of the matter was that specie of partnership known as a joint adventure, which existed not merely as to Maury and McLean, but which included as well Major Peyser and Mr. Ghiselli.

II.

Limited Partnership or Joint Adventure.

(Appellant's Brief, p. 11.)

The appellee admits that the transaction involving the purchase of this property constituted a joint adventure, which is variously designated by the courts as a special partnership, a limited partnership, or sometimes merely as a form of partnership. While this admission resolves any controversy on this particular point, we cite the following cases wherein the nature of the relationship established by such a transaction is defined.

In the case of *McCausey vs. Burnet*, 60 App. D. C. 201, this court noted the distinction between a partnership and joint adventure, as follows:

"The syndicate was not a corporation, nor was it a partnership or other separate legal entity. It was no more than a 'joint adventure'; that is, a 'special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation,' Bouvier's Law Dictionary, 'Syndicate'; 33 C. J. 841."

Tusant & Sons Co., *vs.* Chas. Weitz Sons, 195 Iowa 1386: plaintiffs and defendants were thirteen firms constituting a voluntary association known as "Master Builders Association" of the city of Des Moines. Weitz Sons, one of the members, procured from the Government the contract for building the cantonment at Fort Dodge.

The court held:

"All of the appellants were competent to enter into a joint adventure; but such joint adventure must ultimately rest on a contract, either express or implied, which may be established by direct evidence, or proof of facts, and circumstances from which it is made to appear that such contract was in fact entered into.

"Surely, if these appellants understood that they had entered into a contract with Weitz, and that they were, as now claimed, equal joint adventurers with him in the enterprise, ordinary business capacity, to say nothing of mere curiosity would have prompted them to have inquired of Weitz the terms and conditions of the contract he had secured from the Government, and in which they were jointly interested. . . .

"The initial question in this case is whether or not the several parties who were members of the Master Builders Association *entered into a mutual contract with each other* to engage in a joint adventure. We fail to find that the appellants have established the formation of such a contract, either express or implied. The law applicable to cases of this kind is not obscure. The courts all recognize that the basis of a joint adventure is, of necessity, a contract, either express or implied, but, nevertheless, a contract."

As further illustrating the fact that joint adventure must be founded on a contract, the intent of which is to

create a mutual profit sharing arrangement, see *Whitman, et al., vs. Bartlett*, 156 Ala. 546:

In this case, Bartlett, the plaintiff, had joined Whitman and one McClasky in the purchase of certain cotton in speculation. Several deals were made, the particulars being separately agreed upon. Thereafter and without Bartlett's knowledge, his associates employed the fund of the enterprise in a further purchase and sale of cotton, realizing a profit, for a share of which Bartlett sued.

It was held (syllabus):

“For one to recover his share of profits, made in a joint adventure, he must show that there was a contract made between himself and the others; it is not enough that he was interested in a fund used by the others in such transactions without his authority.”

In *Jackson vs. Hooper*, 76 N. J. Equity 185, the distinctions between a partnership and a co-adventure and the scope of agency thereby created is discussed. This opinion has been cited frequently in the Federal Courts and in the Supreme Court.

In *Keyes vs. Nims*, 43 Calif. Apps. 1, the court went so far as to hold that the agency of one co-adventurer for the others did not exist as in case of a partnership. This doubtless has to be understood with reference to the facts of the particular case, in which one of the parties was giving his time and information to the business while the other advanced the necessary funds and supervised the general management of the transaction. It may be a very reasonable deduction from any agreement of joint adventure that, in the absence of an estoppel, it was not intended that one party should have the

power to bind the other in matters pertaining to the business.

In this connection it will be noted that the property in this case was conveyed to Major Peyser as trustee, declarations of trust were issued by him, the property was managed by him, and when the sale was made, the entire proceeds were delivered to him for distribution. All necessary funds having been provided at the outset, no occasion existed for any of the parties to raise funds for the purpose of the transactions.

It is also a rule of law with respect to co-adventure that where one party refuses, or is unable, to perform his obligation, his associates may, after proper notice to him, carry on the joint enterprise to his complete exclusion. *Saunders vs. McDonough*, 191 Ala. 119 (131); *Goss vs. Lanin*, 170 Iowa 63; *Miller vs. Butterfield*, 79 Calif. 62; *Appeal of Yaeger*, 100 Pa. St. 88.

In *Hege vs. Tilford*, 37 N. Y. S. 751, the court defines the rules of agency involved in partnership and joint adventure cases, and points out that in actions between the alleged parties to the partnership or transaction, different rules of evidence to establish the relations of the parties arise than exist in the case of actions between third persons and the firm or coadventurer. See also *Assurance Co. vs. Drennan*, 116 U. S. 461.

III.

The Appellee Was Not Bound by the Transaction and Agreement of McLean With the Plaintiff.

The appellant's claim, broadly speaking, is that because McLean was a partner, Maury, and we assume the rule would be claimed to extend to the other members of the joint adventure, is responsible to the appellant

upon the theory that one partner is liable for the acts of a co-partner because each partner is the agent of the partnership and the relation of principal and agent always exists.

Appellee concedes that under the law of partnership, a relation of principal and agent exists and we may admit *arguendo* that the same rule applies to the case of a special partnership of a character described as a joint adventure. This rule of principal and agent, however, has a very important corollary limiting the authority of the agent to such acts as come within the scope of the business.

It is not shown or contended in this case that any express authority was given McLean by Maury or by any of the co-adventurers to sell this one-fourth interest in the joint adventure to Mrs. McLemore, and the appellant therefore relies upon the implication of authority based on the broad contention that being partners, the appellee was liable for McLean's acts. The question therefore arises: Does the fact that such a special partnership makes each co-adventurer the agent of the other impute authority to sell an interest or share in the partnership itself, thereby bringing in a new partner unknown to the others?

While the same rule of agency extends to a special as to a general partnership, the application of the rule is limited in the former by the fact that the business which is the subject matter of the agreement is more limited in its scope. The cases therefore hold that the authority of a member of a joint adventure to act as agent for his associates is much more limited than that of a general partner, as there is implied authority to do only those things which are necessary in the management of the venture.

From the case of *Wrenn vs. Moskin*, 235 N. Y. S. 405, (409 sub. 3), we quote as follows:

"The learned trial judge held that, from the relationship of the joint adventure itself, Brooks automatically derived authority to demand and receive from Wrenn Bros. & Co., any of the securities of the joint venture, either without payment or for inadequate payment. We hold that no such authority is to be derived from the relationship of a joint venture. This court has so held in *Graham Bros, etc., vs. Insurance Co.*, 220 App. Div. 712, 221 N. Y. S. 828, affirming without opinion the same case reported in 127 Misc. Rep. 403, 216 N. Y. S. 346. It was there held with respect to a joint venture, that 'to find that one is agent of the other, we should find that authority so to act was given by that other by agreement, express or implied'. 33 Harvard Law Review 854. This doctrine is supported by the authorities there cited. *Jones vs. Gould*, 209 N. Y. 419; *Williams vs. Gillies*, 75 N. Y. 197; *Smith vs. Bank*, 135 N. Y. S. 985; *Kent vs. Universal Films Co.* 193 N. Y. S. 838; *Badeley vs. Consolidated Bank*, 38 L. R. Ch. Div. 238, 249.

"A joint venture in this respect differs from a partnership, and the claim that Brooks had such authority must be grounded upon evidence that it was given to him. There is no such evidence. It is true that he was to manage the account, but his management was to be for the joint venture."

In the case of *Bond vs. O'Donnell*, 205 Iowa 902, the court states:

"A joint adventure is a limited partnership, not limited in a statutory sense as to liability, but as to scope and duration."

In 33 C. J. 871, Sec. 99, the following is found:

“As to third persons who deal with a joint adventurer in good faith and without knowledge of any limitation upon his authority, the law presumes him to have been given power to bind his associates by such contracts as are reasonably necessary to carry on the business in which the joint adventurers are engaged, and they become liable upon such contracts, notwithstanding they may have expressly agreed amongst themselves that they should not be liable. But he cannot bind his associates by contracts made outside of the scope of the business in which they are engaged, or by contracts made for his individual benefit.”

Applying this rule to a joint adventure in the purchase of real estate, it would seem that the syndicate, as it is frequently termed, would be liable for repairs to the property ordered by a member or other expenses incurred in the management of the property or its ultimate resale. This is the business of the joint adventurer.

We can not, however, conceive upon what theory after the joint adventure has been entered upon in good faith by four parties who have each advanced the full amount necessary to complete the transaction, it could be claimed that one of these parties who had misapplied a portion of the funds contributed by his associates had implied authority to bind them without notice, either by borrowing the money from a stranger, or by selling shares in the transaction to a person who by that act would become one of the co-adventurers.

Harris vs. Morse, 54 Fed. 2d 109: While this case dealt with a joint adventure in stock, rather than in real estate, the opinion is most illuminating. The suit was brought by Harris against Morse on a claim to impress

a trust in a co-adventure with defendant in respect to the acquisition of stock of the Addressograph Company.

The associates in this co-adventure were, in addition to the defendant, one Russell, deceased, Woods and Rogers. The plaintiff claimed that because of certain dealings *between himself and the deceased Russell* and the initiation of the transaction by him under an original option taken by him (plaintiff), he was entitled to a share in the transaction. It appeared that Morse had no knowledge of any fiduciary relationship between the plaintiff and Russell.

The court states:

“Morse was brought into the situation by Russell, without, so far as Harris was concerned, any basis for any limitation in equity or fair dealing on his freedom of action.”

The court further states (113):

“Concededly, there was not any contract relation between Harris and Morse, and it is, therefore, necessary to determine whether any direct relationship of a fiduciary nature between Harris and the defendant Morse has been made out.

“Each case in which a co-adventure is claimed and a trust is sought to be declared against a defendant depends of course for its result on its own facts, and owing to the multifariousness of facts, no case of co-adventure rises higher than a persuasive precedent for another.

“I have read the authorities dealing with co-adventure which have been cited to me in the briefs of counsel in this case with care, and I think that there is a lowest common denominator to all such of them as I should be willing to consider to have been correctly decided.

“The common denominator to which I refer

is that any defendant against whom relief has been granted, has from his first connection with the co-adventure, or with the situation that has eventuated into the co-adventure, occupied knowingly and consciously toward the successful plaintiff some kind of relationship in which equity recognizes fiduciary obligations.

"Indeed, this principle seems to be admitted by the plaintiff in the thirteenth paragraph of his complaint wherein he explains his omission of Woods and Rogers as parties defendant thereto."

It is obvious that the omission of Peyser and Ghiselli in the present case is an exact parallel to the omission of Woods and Rogers as defendants in the case just cited, and that the trial court having found that Maury was without knowledge of the transaction between McLean and the plaintiff, and of the payment of her money to the Title Company, there was no fiduciary obligation of the appellee to appellant.

IV.

Agency Is Not Imputed as Between Joint Adventurers in Their Transactions Inter Sese.

The doctrine of agency in such transactions applies to the dealings between an association or a partnership and some third person, and has no relation to the dealings of one party with the other. In this case the contention of the plaintiff, if correct, is that she was one of the members of the joint adventure.

In the case of *Harber vs. Graham*, 105 N. J. L. 203, the court states:

"Taking up the 'common enterprise' point, we think the learned trial judge lost sight of the fact that this principle, resting as it does, upon

the relation of agency existing *inter sese* among persons engaged in a joint or common enterprise, is applicable only as regards third persons not parties to such enterprise."

See also *Keyes vs. Nims*, 43 Cal. Apps. 1; *Bernitt vs. South, etc. Co.*, 213 Fed. 378; *Cain vs. Hubble*, 184 Ky. 38; *Hege vs. Tilford*, 37 N. Y. S. 751; *Smith vs. Bank*, 135 N. Y. S. 385; and *Cooper vs. Frierson*, 48 Miss. 300. In the latter it was held that in the case of a person making a crop on joint adventure, the owner of land has no authority to pledge the crop for his own debt. On this point see also 33 C. J. 873.

We, therefore submit that the decree dismissing the bill of complaint should be affirmed.

Respectfully submitted,

RALPH P. BARNARD,

WILLIAM E. RICHARDSON,

Attorneys for Appellee.